No. 22148

In the

United States Court of Appeals

For the Ninth Circuit

RICHARD S. SIMPSON,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Appellee.

Brief for Appellee

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STATEMENT OF THE CASE

A. Proceedings Up to the Supreme Court's Decision

This case has been here before, *Simpson v. Union Oil Company of California,* 311 F.2d 764 (1963).

In 1958, the year this suit started, Simon N. Whitney, Chief Economist and Director of the Bureau of Economics of the Federal Trade Commission, noted that there were three different ways in which refiners or suppliers of gasoline marketed their product.[1] One was to sell directly at retail to the motoring public through

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The 20-volume transcript on the present appeal consists of two volumes of Clerk's Transcript and 18 of Reporter's Transcripts. We shall cite the Clerk's Transcript as "1 R. ....." or "2 R. .....", and the Reporter's Transcripts as "R. .....". We shall cite the printed record in this Court on the prior appeal, No. 17308 in this Court's files, as "First R. .....".

All emphasis in quotations in this brief has been added unless otherwise stated.

1. Simon N. Whitney, Antitrust Policies (Twentieth Century Fund, New York, 1958), Volume 1, p. 126.

wage-paid employees. Another was to sell directly at retail to the motoring public through consignees, that is, to sell through dealers engaged as commission-paid agents of the refiner. The third was to sell to retail dealers who resell to the public.

Appellee[2] is one of the many refiners and marketers of gasoline on the West Coast. Before 1955 its method of marketing its branded gasoline was Whitney's third method, sale to retailers for resale by them. In 1955 it adopted Whitney's second method, sale directly to the motorist through the agency of consignees.

For some years before 1956 appellant[3] had been one of Union's wage-paid employees, his last salaried position being that of a district representative to its dealers. As such, he was familiar with Union's consignment method of marketing and with the consignment agreement and was the employee through whom Union presented and explained it to each of the 32 Union dealers in the district.

In 1956 he craved to be a Union dealer at a Union station in Fresno, California. In May 1956 he leased the station from Union for a term of one year. In 1957 Union gave him a new one-year lease. Concurrently with the first lease, Simpson and Union executed a Retail Dealer Consignment Agreement ceasing by its terms on any termination of Simpson's right to occupy the station. In April 1958 Union notified Simpson that it would not offer him a further lease at the end of the lease year and that it was terminating the consignment agreement concurrently.

The day before his lease was to expire Simpson brought this action to enjoin Union from taking possession of its property and obtained a temporary restraining order. June 3, 1958, the court (Chief Judge Harris) denied an interlocutory injunction, *Simpson v. Union Oil Company,* 162 F.Supp. 746. Union then sued Simpson in a State court for unlawful detainer of the property and obtained a judgment, and Simpson surrendered possession.

He then amended the complaint in this action to seek damages, charging violation of the Sherman Act. The suit was an unusual

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2. Hereafter sometimes called "Union".

3. Hereafter sometimes called "Simpson".

kind of antitrust case, for there was only one defendant, the case involved only the conduct of that one party, acting alone, and was neither a conspiracy case nor a monopoly case.[4] The gist of his contention was that the consignment agreement was illegal as a price-fixing agreement in restraint of trade. He claimed that Union refused to give him a new lease because of his refusal to honor the obligations of the consignment agreement to charge the prices Union directed him as its agent to charge for gasoline.

Union moved for summary judgment. Denying this motion in order to permit Simpson the opportunity to "throw more light upon the alleged claim" by further discovery and "without prejudice to its renewal at such time as more facts may become the predicate upon which a decision on the motion can be based", the court (the late Judge Edward Murphy), observed that the "plaintiff's case is extremely thin." (First R. 87-88) The court (Judge Burke) then took control of the litigation and initiated a series of pretrial conferences. As this Court observed in its opinion on the first appeal, "to say the least plaintiff's contentions vacillated" (311 F.2d 764, 767). After extensive pre-trial and discovery, Union again moved for summary judgment, and Simpson moved for partial summary judgment. At the urging of the District Court, to produce a sharp issue and to put an end to Simpson's incessant shifting of theories, Union stipulated that it was its policy to lease its stations only to consignees, and that it declined to give Simpson a new lease because he had violated the consignment agreement (First R. 409)[5] Union's motion was

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4. At an early pre-trial conference (April 30, 1959) Simpson's counsel conceded that "This is not a conspiracy case. This is a case of the action and activities of a single defendant." At the next pre-trial conference (May 21, 1959) he repeated, "The complaint does not charge conspiracy" and that "Monopoly as such is out of the case" (First R. 369, 395-397).

5. We assumed that we were so stipulating for the purposes of our motion, but, subsequent to remand after the first appeal, we observed that our language was "for the purposes of this case". We therefore honored not only the intention but the inadvertent language of the stipulation, and the case was tried with that stipulation as a predicate. (R. 251-2, 262-272)

granted with an opinion, *Simpson* v. *Union Oil Company of California,* 1961 Trade Cas. ¶ 69,936, p. 77,693.

From the judgment of dismissal, Simpson appealed, and this Court affirmed, *Simpson* v. *Union Oil Company of California,* 311 F.2d 764.

B. The Supreme Court's Revolutionary Decision and the Striking Last Sentence of Its Opinion

The Supreme Court granted certiorari, reversed by a 5-3 division, *Simpson* v. *Union Oil Company of California,* 377 U.S. 13, and remanded the case for further proceedings. Its decision was revolutionary. Few decisions have been the subject of so much law review comment. What the Court did was to overrule its settled law that selling by consignment was simply selling through an agent and that it was not illegal price-fixing for a principal to establish the price at which his agent was to sell its goods, *United States v. General Electric Co.,* 272 U.S. 476 (1926).

The opinion of the Supreme Court concluded with this striking sentence that more than one court and writer has commented upon, namely:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." (377 U.S. at 24, 25)

That sentence underlines most of the case as presented to this Court on the present appeal.

C. The Proceedings Following the Supreme Court's Opinion

The Supreme Court's decision was rendered April 20, 1964. May 8, 1964, Union filed with the Supreme Court a Petition for Rehearing in which, *inter alia,* (p. 5) it quoted the concluding sentence of the Court's opinion and continued:

> "But this leaves unstated who is to determine the existence of the 'equities'. Is it to be the jury on a trial of this case?

> Or, since determination of equities is normally not within the province of juries, is it to be the trial judge? Or must the case return to this Court for determination of the equities? If it is to be returned to this Court, then we respectfully submit that the equities should be determined now unless their determination rests upon the facts not before the Court."

That petition for rehearing was denied without comment, *Simpson v. Union Oil Company,* 377 U. S. 949.

After the case returned to the District Court (1 R. 1-4), Union moved for a pre-trial conference (2R. 587-589),

> "to determine the mode and order of trial of the issue reserved by the Supreme Court of the United States, viz.: Whether the equities do not preclude retrospective application of the rule announced by that Court to this case."

At the hearing on this motion Union's counsel said (R. 7-9):

> "How do we go about in this case determining whether the equities preclude retroactive application of this new rule of law? Ordinarily, equities are determined by courts, not juries. In a petition for rehearing to the Supreme Court, I presented the question: Who is going to decide the equity issue you have left open?
>
> "The Supreme Court gave no enlightenment.
>
> * * * * * * *
>
> "I can conceive, theoretically, * * * of three possible ways in which this question of equity is to be determined.
>
> "First, I would assume that equities being questions for judges, not juries, it would be determined upon a hearing to be held before the court first. After the court had heard all of the evidence, it could then decide if in fact the equities did preclude recovery, and there would be no jury trial at all.
>
> "Or, still thinking of the theoretical possibilities, the whole thing would be tried before the jury and have the jury decide it, in which they hear not only the evidence that bears upon the legality, but also evidence that bears upon the equity of applying a new rule of law. This rather baffles me, that a jury would pass on this.

> "Or, the third possibility is that the whole issue be heard before the court and jury simultaneously, the evidence coming in all at once, the judge deciding at the close of the case whether the equities precluded letting it go to the jury or not."

Union's counsel stated that Union did not care which of these several procedures was to be followed, but that it should know before trial, in order to know when and at what time to offer "the evidence bearing upon the fairness and decency and equity of applying a new rule of law retroactively * * *" (R.9). Simpson's counsel retorted that the Supreme Court's opinion did not leave any such equity issue open in this case (R. 16-17 and 2 R. 41).

Two other pre-trial conferences were held on the subject with extensive briefing. In June 1966 the District Court made its "Pre-trial Order" which reads, *inter alia,* (1 R. 123-124):

> "This action having been remanded to this Court by the Supreme Court of the United States for trial, and the Supreme Court's opinion stating that
>
> > 'We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today,' * * *
>
> "IT IS HEREBY ORDERED as follows:
>
> * * * * * * *
>
> "2. Included in the issues to be tried is the issue whether the equities warrant only prospective application of the rule announced by the Supreme Court in this case governing price fixing by the consignment device; specifically, in this case, where the facts occurred before the Supreme Court announced its rule, whether the equities preclude application of that rule. In that connection, upon the trial of the case, defendant shall be afforded an opportunity to present to the Court and to the jury evidence supportive of its claim that the equities do not warrant application in this case of the rule respecting consignment agreements announced by the Supreme Court."

On August 8, 1966, Simpson filed in the United States Supreme Court a "Motion for Leave to File Petition and Petition for Writ of Prohibition or Mandamus, or Both in the Alternative" (Supreme Court Misc. No. 553, October Term 1966), contending that the pre-trial order violated the Supreme Court's mandate and seeking to prohibit "the enforcement of the Pretrial Order" and to compel the District Court "to preclude defendant from asserting any 'equities' which would warrant prospective application of this Court's decision in 377 U. S. 13 in any other Court than" the Supreme Court. He further argued that in any event the equity issue was not to be tried by a jury. Union replied that it was indifferent whether the issue was to be tried by court or jury and that the pre-trial order merely specified that there was to be a single trial with all the evidence coming in before court and jury but leaving open to the trial judge the question whether the equity issue would be put to the jury or decided by the court. The Supreme Court denied Simpson's motion, *Simpson v. United States District Court,* 385 U. S. 806 (1966).

Thereafter the case was tried below before Judge Wollenberg and a jury in January and February, 1967. At the final pre-trial immediately before trial Simpson's counsel again took the position that the equity issue was for the court to try, not the jury, stating (R. 146):

> "I had urged at the pretrial stage of the case that this whole question of equities really ought to be decided, if at all, by the trial court, that it was not a jury question."

And again, (R. 174):

> "This other question is simply a matter of whether or not, assuming a verdict, there is going to be a judgment against the defendant, and that is for the Court to decide, not the jury. Now, of course the Court, in the exercise of its equity jurisdiction, can ask interrogatories of the jury. But certainly it's not going to let the jury determine whether or not it is going to enforce a judgment. That is simply up to the Court.
>
> We would urge, Your Honor, that these are well known principles. And there is certainly nothing in the Supreme Court opinion to indicate that the trial should proceed in any

other way. Now, I think all they have in mind there, assuming the correctness of the pretrial order, is that they want all the facts, the whole record, before they determine the application of that decision.

Now, that doesn't mean that the jury must decide all those facts. All they want is a full and complete record."

And again (R. 178):

"If they come in with a verdict in favor of the plaintiff, then we have the question of whether the Court will enter that judgment."

At the close of the evidence, the District Court acceded to the view urged by Simpson; it held that the equity issue was not to be decided by the jury and reserved it for the court's own decision after return of a verdict (R. 1632-3). The jury was given the case to determine what damages, if any, plaintiff had sustained if Union had violated the law. The jury returned a verdict for Simpson for $160,000 (2 R. 297).

The court then held the equity issue for briefing and argument (R. 1670). Defendant filed a timely motion for judgment notwithstanding the verdict on the ground that there was no evidence to support a finding that Simpson suffered any damage. It also filed a motion for new trial (2 R. 301). Plaintiff filed a motion to enter judgment upon the verdict (2 R. 361). After full briefing and argument (R. 1675-1804), the court decided the equity issue for defendant (R. 1801-1803), denied plaintiff's motion for judgment and "defendant's motion for judgment on the issues submitted to the jury notwithstanding the verdict" (2 R. 550), but granted defendant's motion for new trial (R. 1803).[6]

The court made extensive "Findings and Conclusions of Law" on the equity issue (2 R. 540-547), which are reported in *Simpson*

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6. The court denied the motion for judgment notwithstanding the verdict because it was not "completely convinced that there is no such evidence if the cause of action lies here and if there is some proof of damage. I do think, however, that the amount of damage in the sum of $160,000 is not sustained by the evidence [and] is [un]conscionable." (R. 1803.)

v. Union Oil Company of California, 270 F.Supp. 754. By Finding 14 it found (2 R. 546):

> "On all the facts as they now have been made known by the trial of this case, it would be unfair and inequitable to apply to this damage action, wherein the operative facts all arose in the years 1956-1958, the rule respecting price-fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California,* 377 U. S. 13."

Its Conclusions 2 and 3 read (2 R. 546-547):

> "2. The belief of defendant prior to April 20, 1964 that the Retail Dealer Consignment Agreements between itself and retail gasoline dealers and the actions taken by it pursuant thereto were entirely lawful under the antitrust laws was reasonable and warranted by *United States v. General Electric Company,* 272 U. S. 476 and other authorities."
>
> "3. The equities warrant only prospective application to damage suits of the rule respecting price fixing by the consignment device announced on April 20, 1964 in *Simpson v. Union Oil Company of California,* 377 U. S. 13, and, particularly, do not warrant application of said rule to this case."

The court then entered its written Orders and Judgment (2 R. 548-550). The Judgment adjudicated (2 R. 550):

> "plaintiff's action herein against defendant is dismissed with prejudice".[7]

Its order with respect to a new trial was that

> "defendant's motion to set aside the verdict on said issues [the issues submitted to the jury] and to grant a new trial thereon should a further trial be necessary is hereby GRANTED."

In granting this new trial the court said that "there was more speculation, guess work and conjecture in making up the sum

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7. Appellant argues that this judgment is inconsistent with the order denying Union's motion for judgment notwithstanding the verdict (App.Op.Br. 16, para. numbered 6). The denial of the motion for judgment notwithstanding the verdict was expressly stated by the court to be a denial of judgment on the issues submitted to the jury (2 R. 550). The equity issue was not submitted to the jury.

of $160,000 than I have ever experienced with a jury * * *" (R. 1803).

From that judgment plaintiff has appealed (2 R. 558).

D. The Questions Presented by This Appeal.

Although appellant's brief (pp. 10-13) purports to state 8 questions and 8 specifications of error, these are proliferation of but two questions:

> *Question 1:* Did the District Court err in holding that the equities warranted only prospective application to damage suits of the rule respecting consignment announced on April 20, 1964 by the Supreme Court and did not warrant application to this case, and, on that basis, entering judgment for Union? Appellant's Questions 1, 2, 3, 4 and 5 and Specifications I, II, III, IV and V all relate to this.
>
> *Question 2.* Did the District Court err in granting a new trial, should its dismissal be held erroneous? Appellant's Questions 6 and 7 and Specifications VI and VII relate to this.

If this Court should affirm the District Court as to Question 1, as we submit it should, there will be no need to pass on Question 2. Nevertheless, we shall discuss both questions.

Pseudo-Question: In his Statement of the Case, appellant asserts that the District Court foreclosed certain issues (App. Op. Br. 8)[8], i.e., alleged issues of "attempt to monopolize" and "tieing sale of petroleum products to its leases". Although appellant's Question 8 (App. Op Br. 11) and Specification of Errors VIII (App. Op. Br. 13) purport to raise a question about this, the matter is nowhere discussed and is "deemed abandoned and need not be considered herein," *Peck v. Shell Oil Co.,* 142 F.2d 141, 143 (9 Cir. 1944), and cases there cited. We therefore relegate a brief discussion of the matter to an Appendix I to this brief.

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8. The designation "App. Op. Br." is used to refer to Appellant's Opening Brief.

Argument

I.

THE DISTRICT COURT CORRECTLY HELD, PURSUANT TO THE SUPREME COURT'S MANDATE, THAT THE NEW RULE ANNOUNCED BY THE SUPREME COURT ON THE FIRST APPEAL SHOULD NOT BE GIVEN RETROACTIVE APPLICATION SO AS TO APPLY TO THIS CASE.

A. Summary and Fundamentals About the Equity Issue.

The Supreme Court's opinion in *Simpson v. Union Oil Company of California,* 377 U. S. 13 (April 20, 1964) concluded with this statement (pp. 24-5):

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

From this simple declarative sentence and its context a number of significant matters are obvious.

1. That sentence was not a commonplace provision in judicial opinions. Its inclusion was calculated and deliberate.

2. What the Supreme Court declared to be the *rule* concerning consignments was a *new* rule, one which theretofore had no existence. It was a "rule * * * *which we announce today*", April 20, 1964.

3. The rule which the Supreme Court then announced was to govern business *thereafter.* It could be the basis of court injunctions or of Federal Trade Commission cease and desist orders. Obviously, too, the rule would apply *in criminal actions and damage suits arising out of facts which should occur after April 20, 1964.* But whether it should be applied *in damage suits* arising out of facts that occurred before that rule was announced was another matter entirely. The Supreme Court made it crystal clear that its pronouncement did not necessarily constitute a rule to govern the past.

4. The Supreme Court did not itself decide the equity issue but left it open to be decided "when all the facts are known." Since a trial is the mode in which the law ascertains facts, the Supreme Court's mandate necessarily included a direction to the District Court to ascertain the facts upon which the determination was to be made as to what rule of law was to be applied to the case. Appellant's argument that the Supreme Court merely reserved to itself the right to make that determination finds support in no known procedure. Referring to the very sentence in the Supreme Court's *Simpson* opinion with which we deal, *Lyons v. Westinghouse Electric Corporation,* 235 F.Supp. 526 (S.D.N.Y. 1964) said, "the lower federal courts have the obligation to reach their own conclusions on this question until such time as the Supreme Court decides it." (P. 536). No doubt the District Court's determination is reviewable by this Court under the usual standards of appellate review and later by the Supreme Court if it should then deem certiorari warranted. But the contention that the issue must somehow be left in Limbo unless and until the case should reach the Supreme Court is patently senseless. Appellant's contention that "the most the trial court should have done was to allow Union Oil Company to open the record for any taking of evidence that would aid or assist the Supreme Court in determining whether or not there were any equities in accordance with its opinion" (App. Op. Br. 37) would create an unheard of procedure. It would amount to the Supreme Court's appointing the District Court as Special Master to take evidence without findings or recommendation and without any procedure for reporting back.

5. The issue left open by the Supreme Court was not merely whether the rule it announced on April 20, 1964 is to be applied to *other* damage suits. It included the question whether the rule is to be applied in this very case. The statement, "We reserve the question", necessarily referred to a *question* in the case before the court; it was not purely a gratuitous reference to some question that might arise in some other case. In *Guidry v. Continental Oil Company,* 350 F.2d 342 (5 Cir. 1965), the court, speaking of the Supreme Court's decision in *Simpson,* said (p. 344):

"However, the Court in Simpson reserved 'the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damages suits of the rule governing price fixing by the "consignment" device which we announce today.' This reservation seemingly *refers to the inequity to subjecting the Union Oil Company to a triple damage action for conduct that was apparently legal until the narrowing of United States v. General Elec. Co.,* 1926, 272 U. S. 476, 47 S.C. 192, 71 L.Ed. 362."

6. Equities relate to fairness. The question thus left open by the Supreme Court is this: "Is it fair to change the rules of the game after the game has been played?" Is it fair to mulct one in damages for acts innocent and justifiably believed to be legal when done and on that foundation to give Simpson a lifetime annuity on the factual basis that he chose to flout a contract into which he had knowingly entered with deceitful purpose to defraud Union?

7. The kind of *damage* suits that arise from antitrust laws are suits for *treble damages.* Treble damages are in the nature of criminal punishment. The Supreme Court in *Commissioner v. Glenshaw Glass Co.,* 348 U. S. 426 (1955) refers to the "punitive two-thirds portion of a treble damage antitrust recovery" (p. 427) and denominates it as "payments * * * extracted from the wrongdoers as punishment for unlawful conduct" (p. 431). In *Leh v. General Petroleum Corporation,* 330 F.2d 288, 298, 299, (9 Cir. 1964), reversed on other grounds, 382 U. S. 54 (1965), this Court said:

"What is recovered under Section 7 of the Sherman Act (15 U.S.C. § 15 note) is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6. (15 U.S.C. § 6.)"

In *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820, 831-32 (9 Cir. 1963), this Court approved the statement of Judge Learned Hand

in *Lyons v. Westinghouse Electric Corp.,* 222 F.2d 184 (2 Cir. 1955), cert. den. 350 U. S. 825 (1955), (p. 189) that recovery in an antitrust action "inevitably presupposes a punitive purpose. It is like a *qui tam* action, except that plaintiff keeps all the penalty, instead of sharing it with the sovereign."

8. Moreover, what violates the Sherman Act for civil purposes is also a crime. This and the fact that the damages in this kind of case are akin to criminal punishment *evoke the abhorrence underlying the constitutional prohibition of ex post facto laws* (U. S. Const., Article I, Sec. 9, Cl. 3). [9] While that constitutional prohibition is probably not technically applicable, since it relates to legislation, the rationale of the prohibition of *ex post facto* laws is that justice abhors retroactive application of any rule. This is the basis of the principle that even civil statutes, whether substantive or procedural, are never construed as to have a retrospective application unless the contrary legislative intent clearly appears. *Aetna Casualty and Surety Co. v. I.A.C.,* 30 C.2d 388, 393, 182 P.2d 159 (Cal. Sup. Ct. 1947).

To say that something is abhorred by justice is to say that it is inequitable. The reason the antitrust laws provide for treble damage is to punish those who have flouted a public policy so fundamental. Implicit is the presence of a law-defying mind. The "principal purpose of treble damages seems to be punishment which will deter the violater and others from future illegal acts", *Commissioner v. Obear-Nester Glass Co.,* 217 F.2d 56, 61 (7 Cir. 1954), cert. den. 348 U. S. 982 (1955). But one whose actions are in conformity with the Sherman Act as it had been interpreted by the highest court in the land at the time those actions occur is not flouting the law, and he needs no such punishment to whip him into line.

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9. Every law which makes criminal an act which was innocent when done is an *ex post facto* law, even though given a civil form. *Burgess v. Salmon,* 97 U. S. 381 (1878); *Ex parte Garland,* 71 U. S. (4 Wall.) 333, 377 (1867).

B. Appellant's Constitutional Objections Are Frivolous. It Is Not Necessary That a New and Overruling Rule of Law Apply in the Case in Which It Is Announced. On the Contrary, Overruling Decisions Should Be Given Such Application Only in the Most Compelling Circumstances

Appellant seems to contend that every decision operates "retroactively" so as to apply to the case in which is was issued (App. Op. Br. 23-27). *This is an archaic motion, now rejected.* It stems from the old Blackstonian theory that courts do not make law and never change it, that the law has always existed fixed and immutable, and courts merely find and declare it. Under that theory, while a court may conclude that it had not theretofore correctly "found" the law and may therefore proceed to "declare it" differently, the law has always been exactly as the court last declares it. Under this archaic theory, the new rule applies to past events because it was always the law, hovering in the ambient blue, simply awaiting with patience its time to be discovered. But for quite some time it has been recognized that this theory is pure "myth", as it is characterized in *United States v. Fay,* 333 F.2d 12, 15 (2 Cir. 1964), aff'd *sub nom. Angelet v. Fay,* 381 U.S. 654 (1965). It is there noted that Justice Cardozo was one of early jurists to criticize the theory as wholly unrealistic (*U. S. v. Fay,* supra, at 16). Courts now frankly recognize that (a) they do make and change law—a fact nowhere more true than of the United States Supreme Court in the antitrust field; and (b) that it can be highly unfair and unjust to apply a new rule to events which had occurred before its pronouncement. Consequently courts do deny application of the new rule to the very case in which it is announced.

Appellant's constitutional argument that "separation of powers" and "due process" prevent a court from denying to a litigant rights that Congress has bestowed (App. Op. Br. 16, 23-28) is a naive expression of the archaic theory. Of course courts must apply constitutional laws of Congress, but it is the judicial function to determine and construe what Congress has enacted. When a long-standing judicial interpretation is such that a defendant

has not violated that law, and the highest court as later composed changes its mind, it has been held in certain contexts that it is unconstitutional to fasten the new interpretation on those who acted in reliance on the old. But only once has it been urged that the constitution requires the new rule to be applied, and then the Supreme Court rejected the argument as absurd. *Great Northern Ry. Co. v. Sunburst Oil Co.,* 287 U.S. 358 (1932). As said in *Linkletter* v. *Walker,* 381 U. S. 618, 629 (1965), "the Constitution neither prohibits nor requires retrospective effect." Moreover, no argument as to constitutionality was made below and therefore none is available now. *Williamson v. Weyerhaeuser Timber Co.,* 221 F.2d 5, 15 (9 Cir. 1955)

The question of whether or not to apply the new rule to facts theretofore occurring can arise in a variety of contexts, and the just treatment may vary with the context. For example, if in a criminal case what was formerly thought to be criminal is held not to be, retroactive application to the facts offends no sense of decency, for it means that a man truly innocent of violating law will not be punished. Or a court may pronounce a change in a rule as to the constitutionality of procedure in criminal cases. For example, if new constitutional protections are created, such as right to counsel, there is nothing unfair in applying the new rule to the pending case so as to grant the defendant a new trial; on the other hand it may not be wise, just or fair to apply that new rule to cases which had already gone to judgment. But if a new rule of statutory construction makes criminal what theretofore was not, particularly where the act thus illegalized is not one *malum in se* or inherently immoral but only *malum prohibitum,* as is true of so much economic regulation characteristic of the times, it would be shocking to apply the new rule retroactively:[10]

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10. See, *e.g., State v. O'Neil,* 147 Iowa 513, 126 N.W. 454 (Sup. Ct. Iowa 1910); *Commonwealth v. Trousdale,* 297 Ky. 724, 181 S.W.2d 254 (C.A. Ky. 1944); *State v. Koonce,* 89 N.J.Super. 169, 214 A.2d 428 (Superior Ct. N.J. 1965); *State v. Jones,* 44 N.M. 623, 107 P.2d 324 (Sup. Ct. N.M. 1940); *Laabs v. Wisconsin Tax Comm.,* 218 Wisc. 414, 261 N.W. 404 (Sup. Ct. Wisc. 1935).

In the area of *civil litigation,* the nature of the suit is also relevant. To *excuse* one from liability, by a changed interpretation of law in a situation where he would have been liable under a former rule, may be unfair *in a contract case,* since there the parties have relied on the former rule in making their contract. Thus over 100 years ago, in *Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175 (1863), the Supreme Court held that, in a contract case, it is not constitutionally permissible for the highest court of a state to apply a changed rule to the case in which it was announced:

> "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." (68 U.S. at 206)

And again:

> "The same principle applies where there is a change in judicial decision as to the constitutional power of the legislature to enact the law." *(Ibid.)*

The roots of *Gelpcke v. Dubuque* are further back in history. In *Rowan v. Runnels,* 46 U.S. (5 How.) 134 (1847), it was held that one who had contracted in Mississippi to buy slaves must pay for them despite change of construction of the Mississippi Constitution by the Supreme Court of that state holding that such contracts were illegal. Later, in *Ohio Life Insurance and Trust Co. v. Debolt,* 57 U.S. (16 How.) 415 (1853), following and extending *Rowan v. Runnels,* the Supreme Court said (p. 432):

> "Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow *those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce.* * * * And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law."

In *tort cases,* to *excuse* one from liability by a changed interpretation might be unjust to no one, if defendant's conduct was of the type that occurred without thought by anyone about the state of the law, as in negligence cases. But to *impose* liability for damages on a new interpretation of the law, for conduct theretofore held not to be tortious but wholly lawful, *is obviously unfair and unjust in the extreme.* Moreover, while liability for damages under the Sherman Act sounds in tort, in the present case the tort rests upon a *changed judicial view of the validity of a contract,* and thus the moral revulsion to retroactive and changed law is fully applicable.

In *Linkletter v. Walker,* 381 U. S. 618 (1965) the Supreme Court reviewed the "history and theory of the problem" of retroactive versus prospective application (p. 622). It returned to the problem in *Johnson v. New Jersey,* 384 U. S. 719 (1966). In *Linkletter* it said:

> "At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.' * * * [622]
>
> "On the other hand, Austin maintained that judges do in fact do something more than discover law * * *. [623]
>
> "The Blackstonian view ruled English jurisprudence and cast its shadow over our own * * *. However, some legal philosophers continued to insist that such a rule was out of tune with actuality largely because judicial repeal ofttime did 'work hardship to those who [had] trusted to its existence.' Cardozo, Address to the N. Y. Bar Assn., 55 Rep. N. Y. State Bar Assn. 263, 296-297 (1932). The Austinian view gained some acceptance over a hundred years ago * * *. And as early as 1863 this Court drew on the same concept in *Gelpcke v. Dubuque,* 1 Wall. 175 (1863)." (p. 624)

A line of cases, of which *Gelpcke* is one, seems to have held or intimated that decisions of the highest court of a jurisdiction, though later overruled are law nonetheless for intermediate transactions. In the landmark case of *Great Northern Ry. v. Sun-*

burst, 287 U. S. 358, 364 (1932) (per Cardozo, J.) the Court definitively settled that these intimations were too broad, that courts are not necessarily compelled to do so but may treat their overruled decisions as the law for activities which occurred while those decisions were outstanding "whenever injustice or hardship will thereby be averted." Since *Sunburst* there have been numerous law review articles on the subject. Chief Justice Traynor cited some in his 1960 decision in *Forster Shipbuilding Co. v. County of Los Angeles,* 54 C.2d 450, 458, 6 Cal. Rptr. 24, 28, 353 P.2d 736 (Cal. Sup. Ct. 1960), where he said:

> "In recent years much attention has been given to the problem of mitigating the hardships caused by an overruling of established law. [citations omitted.] Under traditional theory an overruled decision is considered not to have established bad law, but to have merely misstated the law. The overruling decision is deemed to state what the law was from the beginning, and is therefore generally given retroactive effect. * * * *In most jurisdictions, however, courts have established exceptions to the general rule of retroactivity to protect those who acted in reliance on the overruled decision.* * * * The Supreme Court of the United States has held that the United States Constitution does not compel retroactive application of overruling decisions. * * * State courts have * * * frequently stated that the decision whether to apply an overruling decision retroactively or prospectively only turns on considerations of fairness and public policy. * * *
>
> "We have hitherto recognized that the California Constitution permits an appellate court to apply an overruling decision prospectively only, even though it thereby temporarily preserves and applies a mistaken interpretation of the Constitution."

Since then there have been even more law review discussions. See, for example, "Prospective Overruling and Retroactive Application in the Federal Courts", 71 Yale Law Journal 907 (1962).

In *Re Lopez,* 62 C.2d 368, 42 Cal. Rptr. 188, 398 P.2d 380 (1965), the Supreme Court of California observed that

> "Some recent judicial opinions have maintained that it is 'generally undersirable to give retroactive effect to overruling decisions, except in the most compelling circumstances' " (p. 379)

and also said (p. 372) that new interpretations

> "should be applied retroactively *only* in those situations in which such new rules protect the innocent defendant. . . ."

In *Linkletter v. Walker,* 381 U. S. 618, 628 the Court concluded:

> "Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective."

And by "prospective" is plainly meant cases whose facts arise after the time the decision is rendered. "It was the judgment of this Court that changed the rule and *the date of that opinion* is the crucial date" (381 U. S. at 639). Thus in *Johnson v. New Jersey,* 384 U. S. 719 (1966) the Supreme Court said (p.732):

> "All of the reasons set forth above for making *Escobedo* and *Miranda* nonretroactive suggest that these decisions should apply only to trials begun after the decisions were announced."

In *Mosser v. Darrow,* 341 U. S. 267, 276 (1951), Justice Black had said, some years ago, that when the Court announced a new rule creating heavy liabilities in civil cases, it should apply the rule only prospectively.

In the course of this developing law, as courts groped for a correct view and moved away from the mythical Blackstonian theory, an occasional state court took the curious course of applying the rule retroactively to the case in hand, while making it prospective for all other cases. In major part this was due to the remaining hold of the old Blackstonian myth that a court could declare law only by applying it in the case in which it spoke. That notion, of course, is now dead. As said in *State v. Martin,* 62 Wash. 2d 645, 384 P.2d 833 (Sup. Ct. Wash. 1963):

> "We note that the doctrine [of prospective overruling] had not yet attained full vigor but was still geared to the concept that the overruling in futuro was in some way connected with the idea that it was more a prophecy of what the law would be in the future, than a declaration of a rule of law. Not so the doctrine today. We no longer need measure the niceties of stare decisis which heretofore have characterized adherence to precedent. * * *
>
> "Experience and reason have combined to cut away the strictures binding the doctrine to the declaratory theory, and, thus liberated, it is now revealed to us as a true component of stare decisis." (384 P.2d at 847)

Moreover, cases where the new rule has been applied to the case at bar but otherwise not retroactively are almost all cases of changed interpretation of constitution or statute for the better protection of a defendant in a criminal or sanity hearing.[11] Of appellant's citations only *Molitor v. Kaneland Community Unit District No. 302,* 18 Ill. 2d 11, 163 N. E. 2d 89 (Sup. Ct. Ill. 1959), was a damage suit, and that was a case overruling the doctrine of sovereign immunity from suit. Whatever may be thought of the merits of that decision,[12] it is not remotely relevant.

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11. Such is *Dooling v. Overholser,* 243 F.2d 825 (D.C. Cir. 1957) cited by appellant.

12. In *Molitor v. Kaneland* the suggestion was made that plaintiff should be singled out for preferred treatment as a "reward". A less rational disposition and a less defensible one in a damage case would be hard to imagine, certainly outside the "immunity" defense. If a "reward" is to be given a plaintiff, it cannot be taken from a defendant who would not be liable to anyone else on like facts and where on like facts no other party would be liable. To hold otherwise would bring the Constitution into play. It would be unconstitutional as violative of the equal protection principle now established as part of the Fifth Amendment to the United States Constitution emanating from our "American ideal of fairness". *Bolling v. Sharpe,* 347 U. S. 497, 499 (1954). In "Tom Molitor and the Divine Right of Kings", 37 Chicago-Kent Law Review 44, 51, the absurdity of the reasoning was exposed, as it was by Professor Keeton of Harvard Law School in "Creative Continuity in the Law of Torts", 75 Har. Law Rev. 463 (1962), at 490, 491. The idea of applying an overruling decision to the case at bar while denying retroactivity to all other cases "produces distinctions perhaps more difficult to justify than either wholly prospective or wholly retrospective overruling"; if rewards are to be given,

In immunity cases the acts of the defendants have always been tortious and regarded as so, but recovery had been barred by the notion that the King could not be sued in his own court. Since the power of courts to limit an overruling decision to the future has come to be fully recognized, courts rendering an overruling decision in respect of business law, such as tax impositions and the like, and applying it prospectively only, deny application to the case in which the new rule is announced. See the comprehensive discussion in *State v. Martin,* 62 Wash. 2d 645, 384 P.2d 833 (Sup. Ct. Wash. 1963). Also *Southern Pacific Co. v. Cochise County,* 93 Ariz. 395, 377 P.2d 770 (1963); *Mutual Life Insurance Co. v. Bryant,* 296 Ky. 815, 177 S.W. 2d 588 (C.A. Ky. 1943); *American-First Title & Trust Company v. Ewing,* 403 P.2d 488 (Sup. Ct. Okla. 1965); *Continental Supply Co. v. Abell,* 95 Mont. 148, 24 P.2d 133 (Sup. Ct. Mont. 1933); *Hare v. General Contract Purchase Corp.,* 249 S.W. 2d 973 (Sup. Ct. Ark. 1952).

In *State v. Martin,* supra, the court said:

> "Prospective overruling imparts that final degree of resilience, to the otherwise rigid concepts of stare decisis, so necessary to prevent the system from becoming brittle. It enables the law under stare decisis to grow and change to meet the ever-changing needs of an ever-changing society and yet, at once, to preserve the very society which gives it shape." (384 P.2d at 849)

Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941), cert. den. 314 U. S. 678 (1941) (cited in App. Op. Br., p. 35), is a case where the court *declined* to apply the changed rule announced in *Nye v. United States,* 313 U. S. 33 (1941) to a past situation.[12a]

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they should come from public funds (Keeton at 491). In *Spanel v. Mounds View School District,* 264 Minn. 279, 118 N.W.2d 795 (Sup. Ct. Minn. 1962) and *Williams v. City of Detroit,* 364 Mich. 231, 111 N.W. 2d 1 (Sup. Ct. Mich. 1961) where the doctrine of immunity for governmental agencies was overruled prospectively, plaintiff's action was dismissed.

12a. *Nye v. United States,* 313 U. S. 33 (1941) merely applied a new rule to the case at bar without stating anything about retroactive application at all; it was a criminal case.

The opinion was written by Justice Vinson, later Chief Justice of the United States Supreme Court, and is all the more remarkable in that it was written a quarter of a century ago. We quote (pp. 645-7):

> "*When a case is decided it is expected that people will make their behavior conform to the rule it lays down and also to the principle expressed in so far as it can be determined.* This is true whether the decision is regarded as 'the law', 'the best evidence of the law', or 'a prediction of what the court will do next time.' * * * Those transactions *which occurred between the two decisions are, for the most part, accepted history.* * * * There has arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argued against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law. Such decisions apply the old law to the case at hand while establishing new law for the future. * * *
>
> "All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not a pure science, that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, *that law needs some stability of administration,* * * * *that people will rely upon and adjust their behavior in accordance with all the law* be it legislative or judicial or both.
>
> "These considerations should guide the lawmakers and the lawappliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past, and if the latter, to what extent. And these considerations should be applicable to both sides of a potential litigation, civil or criminal, *so that we may have our rules of the game as we go.*"

It is in this setting of realistic law that the Supreme Court wrote its sentence in Simpson v. Union Oil Company, viz.:

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." (377 U. S. at 24-5.)

Appellant seeks to escape the inevitable conclusion by arguing that the Court did not use the term "purely prospective" (App. Op. Br. 34), pointing to use of that phrase in *Linkletter v. Walker,* 381 U. S. 618 (1965). *Linkletter* was decided one year after *Simpson,* and in *Simpson* the term was "*only* prospective". Certainly "only" and "purely" are synonymous.

Of all courts the Supreme Court is the court whose efforts, of necessity, are least directed to the rights *inter se* of the parties in the immediate case. Its position at the apex of the judicial system, the sheer physical limitations on human capacity and time, the exercise of its certiorari jurisdiction, all compel it to direct its attention to establishing the principles of law to be followed by all in the future, leaving it largely to the lower tribunals to apply those principles in particular cases. It is obvious that what induced the Supreme Court to bring up the *Simpson* case for its attention was not any concern whether a particular man named Simpson should recover damages from a particular company named Union Oil, but a desire to rule on consignment merchandising in the economy of the United States. From the nature of things the Court can make its pronouncements only in cases that come before it, *but it realized full well that, in the course of pronouncing rules of conduct for the future,* application of its new pronouncement to treble damage suits arising from past facts could be unjust.

The decision in the *Simpson* case was by 5 to 3 division. Justices Brennan and Goldberg (hardly conservatives) dissented, saying:

> "Since the decision may be expected to affect consignment agreements in many businesses, *including outstanding agreements that may have been entered into in reliance upon United States v. General Electric, 272 U. S. 476, the Court ought not pronounce that judgment.* * * * We therefore agree with Mr. Justice Stewart * * *." (377 U. S. at 31-2.)

Mr. Justice Stewart, dissenting, said:

> "It is clear, therefore, that the Court today overrules *General Electric.* * * * I should have thought that a decision of such impact and magnitude could properly be reached only after careful consideration of all relevant considerations and

preferably by a full Court. *Today's upsetting decision carries with it the most severe consequences to a large sector of the private economy. We cannot be blind to the fact that commercial arrangements throughout our economy are shaped in reliance upon this Court's decisions elaborating the reach of the antitrust laws. Everyone knows that consignment selling is a widely used method of distribution all over the country. By our decision today outlawing consignment selling if it includes a price limitation, we inject severe uncertainty into commercial relationships established in reliance upon a decision of this Court explicitly validating this method of distribution.* We create, as well, the distinct possibility that an untold number of sellers of goods will be subjected to liability in treble damage suits because they thought they could rely on the validity of this Court's decisions." (377 U.S. at 29-30.)

It would be a surmise close to the bull's-eye that the critical sentence at the close of Justice Douglas' opinion was a material factor in making it the opinion of the Court.

No constitutional right to a jury trial was denied appellant.

Part of appellant's constitutional arguments revolves about some claim of denial of jury trial (App. Op. Br. 28-30) which we find obscure. The simple answer is that it is for the court and not the jury to determine what rule of law applies to the case before them; a court does not deny one his jury trial by taking a verdict subject to the court's applying the proper rule. The *determination whether the rule announced by the Supreme Court on April 20, 1964 was or was not to be applied retroactively to operative facts occurring earlier was a judicial task of determining the applicable rule of law.* Moreover, so far as that determination rested on an ascertainment of facts, it was part of determining an equity, which is never a jury function. How absurd and impossible it would have been for a jury to determine the state of the law prior to April 20, 1964, and the reasonableness of reliance on the *General Electric* rule! There are many instances in jurisprudence where, in a jury trial, a ruling of the court must turn on some factual determination which it is the function of the court, not the jury, to make. For

example, court, not jury, determines whether a proffered confession was voluntary before the confession may be admitted, *Jackson v. Denno,* 378 U.S. 368 (1964). Court, not jury, determines whether proffered evidence would be incriminating when the privilege against self-incrimination is raised, just as court, not jury, determines a variety of other disputed foundation questions (Uniform Evidence Code (Cal.), §§ 404, 405).

It was so obvious that the issue was for court, not jury, that from the very beginning appellant himself continually so urged, as we showed in our Statement of the Case, at pp. 7 to 8, supra. When the District Court finally acquiesced in appellant's contention on this score, appellant did not object (p. 8, supra). When the court instructed the jury that this question was not for them, he did not object as required by F. R. Civ. P., Rule 51 if a claim of error was to be preserved.

We cannot tell from appellant's obscure argument whether he now claims that the issue should have been given the jury. But, if he does and if he ever had a right to have the issue go to the jury, which we deny, plainly he waived it. Moreover, no claim of constitutional right was raised below, and so none is available now. *Williamson v. Weyerhaeuser Timber Co.,* 221 F.2d 5, 15 (9 Cir. 1955); *Cox v. City of Freeman,* 321 F.2d 887, 891 (8 Cir. 1963).

C. It Is Unfair to Apply the New Rule of April 20, 1964 to the Present Case, a Treble Damage Suit Based on Facts Arising in 1956-1958

If the jury verdict were permitted to ripen into a judgment, it would be trebled to $480,000 with an attorney's fee added. Some part of the $480,000 would be subject to income tax.[13] This tax

13. A review of federal income tax treatment of recoveries in antitrust litigation appears in Antitrust and Trade Regulation Report, No. 339, Jan. 1968, pp. B-1 et seq. The two-thirds resulting from trebling may be taxable, *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955), but the single "damages" of $160,000 would not be, to the extent that it represents injury to "good will" or loss of a "business". *Raytheon Production Corp. v. Commissioner,* 144 F.2d 110 (1 Cir. 1944), cert. den. 323 U. S. 779 (1944).

would in essence be a payment by Union to the government as punishment for doing what was plainly lawful under the law as all understood it to be when the acts were done. Then, what Simpson would keep, invested at 5%, would produce an income of from $10,000 to $20,000 per year *for the rest of Simpson's lifetime and still leave the principal intact.* This amounts to an annual income from 2 to 4 times as much as Simpson ever earned in any year.[14] *And he would get this windfall for life and leave this large estate, all without the necessity of ever again lifting a finger to a moment's toil.*

An inquiry into equity or principles of fairness must ask what facts can support these bizarre results. The facts are easily summarized. Back in 1956 Union owned the leasehold on a service station in which it had invested large sums of money in order to have an outlet for its gasoline. As we have said, and shall further demonstrate, until April 20, 1964, Union's consignment method of merchandising was absolutely legal under the principles of *United States v. General Electric,* 272 U. S. 476 (1926). Relying on the *General Electric* doctrine, Union proceeded to market its gasoline by consignment, a wholly legitimate procedure at that time. As an employee of Union, Simpson had helped put the consignment system into effect. With his eyes open he acquired possession of Union's service station by solemnly agreeing to sell gasoline as its agent. He then dishonored his word. Because his word was worthless, Union refused to give him further possession when his lease terminated. *Yet, for loss of that further possession, although under California law he had been given only two 1 year leases,* the verdict would give him a fantastic income and estate, because 6 to 8 years after the facts of the case the Supreme Court denounced consignment as illegal. Nor is that the whole of it. It is pertinent to inquire, as we shall do (pp. 52-54 infra), into the morals of the manner in which Simpson managed to insinuate himself into that very possession which he would now parlay into this enormous recovery.

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14. As shown in Part II below.

1. UNION'S RELIANCE ON THE GENERAL ELECTRIC DOCTRINE.

At pages 12, 13, supra, we quoted from *Guidry v. Continental Oil Co.,* 350 F.2d 342 (5 Cir. 1965), a statement that the Supreme Court's reservation "until all the facts are known" referred to *the inequity of subjecting Union to a treble damage action for conduct apparently legal until April 20, 1964.*

Lyons v. Westinghouse Electric Corporation, 235 F.Supp. 526 (S.D.N.Y. 1964) is equally specific. That case involved a consignment set-up for electric lamps similar to General Electric's consignment system. The case was tried at the end of 1963 (p. 529) before the Supreme Court's *Simpson* decision and decided in 1964 after that decision. After holding that *Simpson* overruled the *General Electric* case, the court said (pp. 535, 536):

> "If the new doctrine of Union Oil governs this case, it would seem to follow that the Westinghouse-Ledco agency contract violated the Sherman Act.
>
> * * * * * * *
>
> "The question remains, however, as to whether the Union Oil doctrine should be applied retroactively in this case to invalidate agreements which were legal when made and which were made in obvious reliance upon a decision of the Supreme Court which upheld, in favor of these very defendants, agreements substantially similar to the very agreements here involved. The Court in Union Oil expressly left open the question of retroactivity saying (377 U. S. at 24-25, 84 S.Ct. at 1058-1059):
>
> > 'We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the "consignment" device which we announce today.'
>
> "The phrase 'when all the facts are known' suggests that after further proceedings in the trial court, the Supreme Court may eventually decide that it will not apply the new doctrine to the Union Oil Company in that particular case, but will limit itself to announcing that the new rule will henceforth govern future cases. State courts have followed this approach, and when they do, their action does not violate the Constitution. Great Northern Railway Co. v. Sun-

burst Oil & Refining Co., 287 U. S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

"* * * *the lower federal courts have the obligation to reach their own conclusions on this question until such time as the Supreme Court decides it.*"

The court quoted the Supreme Court's statement in *Gelpcke v. City of Dubuque,* 68 U. S. (1 Wall.) 175 (1863), which we discussed above (p. 17),

"that its decision 'rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal.' (68 U. S. 175 at 206). Although we are here concerned with an overruling decision of the Supreme Court itself, rather than of a state court, the principle which governed in Gelpcke would appear to be equally applicable here."

The important factors in determining whether a new rule should be applied prospectively only are (a) reliance on the old rule and (b) the purpose sought to be served by replacing the old rule by a new one.

The court in *Lyons v. Westinghouse,* supra, cited *United States v. Fay,* 333 F.2d 12 (2d Cir. 1964), aff'd *sub nom. Angelet v. Fay,* 381 U. S. 654 (1965), also discussed by us above (where the court declined to give retroactive effect to *Mapp v. Ohio*) and said:

"In so doing, the court laid down certain propositions which are apposite in the present case. In the first place, the court expressly rejected the Blackstonian theory that a court 'discovers' law, and that the rule set forth in an overruling decision always was the law, which unfortunately the same court in the overruled case had not properly discovered. In the second place, the court said that it is 'generally undesirable to give retroactive effect to overruling decisions, *except under the most compelling circumstances.*' (333 F.2d 12 at 21). *There are no such compelling circumstances here. On the contrary, the circumstances seem to me to compel the conclusion that the doctrine of Union Oil should not retroactively govern this case. If we are to look at the purpose of the Union Oil doctrine, that purpose would appear to be to prohibit price fixing by means of an agency or consignment contract, to the end that competition shall*

be free from this restraint. It could be said that it does not necessarily further the accomplishment of this purpose to impose a liability for treble damages upon one who made such a contract many years ago. The price fixing in such a case is of historical importance only. Its effect on competition is long since past. Competition in electric lamps in 1951 cannot be revived by awarding damages to these plaintiffs in 1964.

"Be that as it may, *it is the element of reliance* by defendants upon the former rule that is to me most compelling. *Here we have an agency system which was expressly upheld by the Supreme Court in General Electric and later by Judge Forman as well.* There can be no doubt whatever that Westinghouse relied on these decisions in continuing that system in effect.

"* * * Westinghouse's business has been left for over thirty years to develop on the understanding that its agency system was not subject to existing antitrust legislation. Although in the present case, unlike the baseball case, the Supreme Court has not followed the principle of stare decisis, but rather *has overruled its earlier decision in General Electric,* at least the fact of reliance should prevent the retroactive application of the overruling doctrine. To hold Westinghouse liable now for damages for making and carrying out a contract which was perfectly legal at the time that it was made and carried out, would be manifestly unjust. It is hard to conceive of a case in which there could be stronger 'equities' in defendants' favor. For these reasons I hold that the rule announced in Union Oil does not govern the Westinghouse agency contracts with which we are here concerned, and that for the purposes of this case, those contracts, under the rule of General Electric, do not contravene either the Sherman Act or the Clayton Act." (pp. 536, 537)

Obviously everything said about Westinghouse applies equally well to Union Oil Company itself. In *United States v. Fay,* the court said (p. 17) that

"Basic to the application [retroactively or prospectively only] * * * is the ascertainment of the reasons behind the decision",

and since the principal reason of the rule of *Mapp. v. Ohio* was to deter "police misconduct" by removing the incentive to violate the Constitution, it concluded (p. 19) that "this purpose is sufficiently, if not completely, served by refusing to apply the rule to searches and seizures long prior to the decision in *Mapp. v. Ohio* or the occurrences involved in that case." In *Lyons v. Westinghouse* the court emphasized the same idea, that in determining whether a new rule should be given retroactively, one must look at the purpose of the rule. And, since, as it said, the "purpose of the Union Oil doctrine" "would appear to be to prohibit price fixing by means of an agency or consignment contract," it did not "further the accomplishment of this purpose to impose liability for treble damages upon one who made such a contract many years ago." It is equally true that it does not further the accomplishment of the purpose to impose liability for damages on Union Oil Company for conduct occurring in 1956-1958.

In *Linkletter v. Walker,* 381 U.S. 618, 629, it was said:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

In *Armstrong v. Motorola, Inc.,* 374 F.2d 764, (7 Cir. 1967), cert. den. 389 U. S. 830 (1967), the defendant in a patent infringement case raised the defense of misuse of the patent, because the patentee had included in a patent license a restriction on the classes of customers to whom his manufacturing licensees might sell the patented product. In including that clause the patentee had relied on the doctrine of *General Talking Pictures Corp. v. Western Electric Co.,* 305 U. S. 124 (1938). Defendant argued that the doctrine of *General Talking Pictures* was no longer good law, and that such restrictions violated the antitrust law under a line of subsequent cases. The Seventh Circuit was not convinced that *General Talking Pictures* was no longer good law,

but it rejected the defense even if *General Talking Pictures* were no longer in effect. It said that the defense of misuse of patent was but an application of the unclean hands doctrine of *equity,* and it pointed out that the licenses were granted at a time when the *General Talking Pictures* doctrine was clearly good law. Said it, "Armstrong [patent owner] was certainly not guilty of any unclean hands by relying upon the then patent law in formulating his licenses." (p. 774) The analogy to the present case is close, for each involves the inequity of punishing one for conduct performed in reliance on the law then in effect under the current Supreme Court decisions.

In *State v. O'Neil,* 147 Iowa 513, 126 N.W. 454, 456 (Sup. Ct. Iowa 1910), the court remarked:

> "Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law."

In *Warring v. Colpoys,* 122 F.2d 642, cert. den., 314 U. S. 678 (1941), from which we quoted extensively, supra, Justice Vinson concluded with these words:

> "It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. *It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be downright chaotic.*" (647)

Further on the importance of the fact of reliance.

In *Johnson v. New Jersey,* 384 U. S. 719 (1966) the Supreme Court emphasized that element of reliance on the old rule. Denying retroactivity to *Escobedo* and *Miranda,* it said (p. 731):

> "Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda.*"

In *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964), plaintiffs challenged the constitutionality of a Louisiana statute. The District Court, under the abstention doctrine, refused to consider the claim until a state court ruled on whether the statute applied to plaintiffs at all. In the state court plaintiffs raised their constitutional objections as well as state law claims, believing that *Government Employees v. Windsor,* 353 U. S. 364, required them to do so. Upon returning to the District Court, plaintiffs' claim was dismissed on the ground that the state court had adjudicated all issues. On appeal from the dismissal the Supreme Court limited the *Windsor* decision. *The opinion was written just three months before the Supreme Court's Simpson decision and uses the same phrase about the "rule we announce today."* Said it (p. 422):

> "On the record in the instant case, *the rule we announce today would call for affirmance of the District Court's judgment* [*of dismissal*]. *But we are unwilling to apply the rule against these appellants.* As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so. *That view* was mistaken and *will not avail other litigants who rely upon it after today's decision.* But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have dismissed their action."

James v. United States, 366 U. S. 213 (1961), overruled the holding in *Commissioner v. Wilcox,* 327 U. S. 404, that embezzled funds are not taxable as income. But the Court refused to apply the holding of the *James* case to James himself and reversed a conviction for income tax evasion because of his "reliance" upon *Wilcox* (p. 221).

Proof of reliance.

Most courts require *no proof* of reliance, for it is presumed that one *does* rely on the law as it had been announced at the time

of the conduct. See, for example, the quotation at p. 23 above from *Warring v. Colpoys,* 122 F.2d 642 (D. C. Cir. 1941), cert. den. 314 U. S. 678 (1941). In *State v. O'Neil,* the court said (126 N.W. 454 at 457):

> "* * * The defendant may be presumed to have acted with knowledge of the fact that the statute now invoked as rendering illegal an act not otherwise wrongful or immoral had been expressly held by this court in cases prosecuted under public authority to be unconstitutional because in excess of legislative power."

And in *Continental Supply Co. v. Abell,* 95 Montana 148, 24 P.2d 133, 140 (Sup. Ct. Mont. 1933) the court said:

> "It is unnecessary that it be shown that reliance was actually placed by defendants upon the former decisions. Reliance thereon will be presumed."

While proof may have been unnecessary, the evidence below was explicit that Union did rely on the *General Electric* doctrine. The District Court so found. Its Findings Nos. 2, 3, 4, 11 and 12 (2 R. 542-546) are as follows:

> "2. Before adopting said system or putting it into effect the defendant consulted its General Counsel, an attorney at law duly admitted to practice and practicing law in the State of California since 1927, with respect to any legal questions that might be involved, and defendant was advised by its General Counsel that there were no legal objections and that the proposed arrangement and consignment agreements were entirely lawful both under the antitrust laws and all other laws. General Counsel studied, among other things, the then state of the antitrust law, particularly including the opinion and decision of the United States Supreme Court in *United States v. General Electric,* 272 U. S. 476, and decisions following that decision, was entirely satisfied that under that decision and the state of the law consignment and the proposed method of merchandising were lawful in every respect and would not violate the antitrust law.
>
> "3. The form and substance of the consignment agreement devised and thereafter used by defendant were modeled upon and were substantially the same as the consignment

agreement and arrangment of the General Electric Company which had been upheld in said *United States v. General Electric Co., supra,* and like the consignment agreement and arrangement used by *General Electric Co.* and involved in that case was true and *bona fide*.

"4. Acting in reliance on the legal advice of its General Counsel, defendant thereafter entered into thousands of consignment agreements with retail gasoline dealers, including the consignment agreement with plaintiff hereafter referred to.

* * * * * * *

11. In 1954 and at all times thereafter until the Supreme Court's decision in this case on April 20, 1964, it was the general and uniform view that the decision in said *United States v. General Electric Co.* was the law, that the rule of that case applied to all kinds of merchandise, and was not confined to patented articles. In relying upon that uniform and general understanding of the law, defendant's General Counsel and in turn the defendant acted reasonably and justifiably.

"12. Defendant at all times prior to the decision of the Supreme Court on April 20, 1964 reasonably believed that the consignment agreements between itself and retail gasoline dealers and the actions taken by defendant pursuant thereto were wholly lawful and did not violate the antitrust laws of the United States and defendant was fully justified in that belief.

Those findings were fully supported by the evidence. Mr. L. A. Gibbons, Union's Vice President and General Counsel, its chief legal officer with final decision for the company on legal matters (R. 1140) testified as follows (R. 1137-1201, 1292-1387): In 1954 union's vice president in charge of marketing informed Mr. Gibbons that he proposed to consign gasoline to the retail dealers and asked whether there were any legal objections to such a program. Mr. Gibbons was familiar with the law, for he had previously considered the legality of consignment in connection with Union's wholesale distributors. He knew, too, that other oil companies consigned. He advised that there were no objec-

tions but that he would "double check" and talk to the marketing vice-president again. He then went to the law library, reexamined and studied the *General Electric* case and other cases, with which he was "quite familiar", examined the California Civil Code sections on factors, viz., California Civil Code §§ 2026, 2027, was satisfied that *General Electric* was "clearly the law" and advised the marketing vice-president that "It was very clear to me there was absolutely no legal objection, antitrust-wise or otherwise" (R. 1143). Union then modeled its consignment on General Electric's (R. 1198).

A note on the *Simpson* decision in 18 Vanderbilt Law Review 222 (1964), refers to the "purpose for Union Oil's adoption of the consignment system of distribution" and said that purpose would have been a "persuasive" reason which "might have influenced the Court had it been advanced" (p. 228):

> "Under the conventional method of distribution in the petroleum industry, the retail gasoline dealer's extremely low profit margin usually resulted in his folding up under the pressures of the all too frequent price wars unless his supplier agreed to share the loss by granting a temporary price allowance. * * * In such cases the supplier was faced with the dilemma of sacrificing his own profit margin or loosing [sic] an outlet. * * * By adoption of the consignment system of distribution the supplier could avoid the necessity of facing this dilemma in three ways. First, by removing the burden of financing a gasoline inventory the supplier could improve the retailer's profit margin. Second, by agreeing in advance on how losses would be shared the supplier could avoid the necessity of a hasty decision. Third, by use of price controls the supplier could practice preventive medicine against price wars. Congress has expressly disapproved of price wars and similar unfair methods of competition. Federal Trade Commission Act, 38 Stat. 71 (1914), 15 U.S.C. §§ 41-44 (1958); Miller Tydings Act, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958); McGuire Act, 66 Stat. 632 (1953), 15 U.S.C. § 45 (1958)."

Prior to the Supreme Court's decision Union had no opportunity in this case to put in evidence of its purpose, inasmuch as it had

obtained a summary judgment in its favor. In fact, Union's purposes were those described in the Vanderbilt Law Review article, and Union had so told the District Court by a written statement in the *West Coast Oil* case in 1958.[15] Mr. Gibbons testified as to what Union was trying to accomplish. Of course consignment enabled Union, so it thought, to determine the price of its product. But control of price was a *means* to certain goals and *not* the *goals* (R. 1188-89). Mr. Gibbons' testimony on the subject (R. 1145-1147) and the *West Coast Oil* case statement can be summed up as follows:

There must be a continual flow of oil products from the refinery to the consumer. To that end Union had invested in numerous retail outlets. In order to be able to give competition to the other major refiners, it was necessary to have service stations that gave (1) good and prompt service (2) at competitive prices. Each of the several ways in which gasoline can be merchandised through such service stations (see pp. 1, 2 above) has advantages and disadvantages, to the public, to the dealer, and to the oil company. The method of operating stations through the company's own wage-paid employees, as Standard of California does, thereby validly fixing the price at which its gasoline is sold to the public, has two major disadvantages, (1) lack of incentive to the employee who runs the station to go out and get business, and (2) a shifting of employees from place to place as they are promoted through the organization; thus the dealer lacks roots in the community. These two disadvantages can be avoided by selling gasoline to retail dealers who buy it and resell. But this method has its own disadvantages. Essentially speaking, there are two classes of dealers. One is the kind who tries to gouge the public by overcharging it, thereby injuring the public, Union, and the dealer himself. The overcharging dealer loses gallonage, and this defeats the very purpose for which Union invested in the station in the first place, to move its product. Moreover, it is at the service station level that Union Oil comes face to face with the public. To the public the station *is* Union, and if the station

15. A certified copy is in evidence here as D. Ex. T, R. 1688.

overcharges, Union's reputation and standing suffer. The second type of dealer is the price-cutter, who charges too little. He not only ends up unable to give the public the kind of high grade service that Union wishes to be associated with its name, but he fails to earn a proper return. In the case of the widely deplored price wars he starts, it becomes necessary for the oil company to come to the rescue of the service station dealer with forms of dealer aid.[16]

Union wished to find a method of operation that struck a balance between the several advantages and the disadvantages. It felt that consignment would do it. Thereby Union could legitimately control the price of *its* gasoline, so it believed, just as Standard Oil still does with its wage-paid employees, but the correlative of this power was the acceptance of *"price responsibility"* to the public and the dealer. And thereby the dealer was relieved of the burden of carrying an inventory and was guaranteed his commission.

In this connection we may recall that Judge James Carter, in the *West Coast Oil* case, *United States v. Standard Oil, etc., et al.,* 1958 Trade Cas. ¶ 69,212, p. 74,760, noted that 1200 of Union's consignees owned their own stations or had them under lease from others than Union but nevertheless chose to be its consignees, saying:

> "The factoring set up may provide a security for these dealers which they find more desirable than the rough and tumble of operating their own business."

Union felt that consignment was a good and legitimate way of doing business, whereby the public was protected, the dealer was protected, and the company itself was protected. The Supreme Court later held that it could not continue to consign. But the legitimacy and honesty of its purpose remain unsullied. And the District Court has so found.

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16. Mr. Gibbons could have added at this point that granting dealer aid can pose difficult Robinson-Patman questions. See *Federal Trade Commission v. Sun Oil Co.,* 371 U. S. 505 (1963).

Answer to appellant's criticism of the finding of reliance.

Appellant seems to make two attacks on the finding of reliance. The first is that Mr. Gibbons did not give consideration to certain decisions. But none of those decisions is relevant or was thought to be relevant at the time, by anyone, as we show later in this brief.

Appellant's next criticism is the obscure one that Mr. Gibbons left matters to "marketing" (App. Op. Br. 21, 40, 44). Obviously, General Counsel is not the marketing department, but the marketing department relied on his advice. If we can glean any intelligence from the argument, it seems to be that, while Union had a right to assume that consignment was legal, it had no right to expect its consignees to live up to their agreements! If a consignment agreement whereby the consignee is required to follow the consignor's price directions *is legal,* as the General Electric case held, it would necessarily follow that the consignor is entitled to enforce the agreement. It also necessarily follows that if the consignee violates the agreement, the consignor is entitled to refuse to deal with the consignee further. One party to a contract is entitled to say to the other, "I will not give you a further lease of my property because you are a man whose word is worthless, a man who will not honor his contracts." It is only by first holding that a consignment agreement is illegal that it can ever be held that refusal to deal further with the defaulting consignee is improper.

Other criticisms by appellant of Mr. Gibbons' reliance involve notions about "coercion" which we discuss at length at pp. 54-61 infra.

2. UNION'S RELIANCE ON THE GENERAL ELECTRIC RULE AS THE LAW WAS ENTIRELY REASONABLE. THE SUPREME COURT DECISION WAS A REVOLUTIONARY ONE CREATING A NEW RULE OF LAW WHICH MADE ILLEGAL WHAT THERETOFORE HAD BEEN LEGAL.

As already quoted, the District Court found, not only that Union had relied on the *General Electric* decision, but that that reliance was reasonable. It further found (Finding 13, 2 R. 546):

> "The rule announced by the Supreme Court in *Simpson v. Union Oil Company of California* on April 20, 1964, was a new rule that changed the law on the subject as it was theretofore generally understood to be."

These findings are plainly correct. They rest on a judicial analysis.

The Supreme Court's decision was so revolutionary that it has evoked a large body of law review comment. Even those who approve the sociology of the decision refer to it as a revolutionary change in the law and are puzzled by its reasoning.

The history of the General Electric rule and its unquestioned acceptance as continuing law.

1911: As long ago as *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), Mr. Justice Holmes outlined the method later perfected by *General Electric* and said:

> "If . . . [the manufacturer] should make the retail dealers also agents in law as well as in name and retain title until the goods left their hands . . . [it could not be denied] that the owner was acting within his rights." (p. 411)

General Electric followed this language closely in drafting its contracts.

1926: In *United States v. General Electric Co.,* 272 U.S. 476 (1926), it was definitively settled that consignment is not illegal under the antitrust laws as a price-fixing arrangement for the simple and obvious reason that the "distinction in law and fact between an agency and a sale is clear" and the antitrust laws do not prohibit one from determining the price at which he sells his own property. That proposition seemed elementary, and until the April 20, 1964 decision in *Simpson,* no court doubted or questioned it.

1941: In *Texas Co. v. Higgins,* 118 F.2d 636 (2 Cir. 1941), Judge Learned Hand, another outstanding jurist, considered the proposition as obvious and true.

1949: Just 5 years before Union decided to adopt consignment, the Supreme Court in *Standard Oil Co. v. United States,*

337 U.S. 293 (1949), which involved Standard of California's practice of selling to dealers under total requirements contracts, observed that, before Standard had adopted that method of marketing, its method was to sell through service stations under agency agreements and that, if Standard's later method were declared invalid, it would probably either return to the agency arrangement or make further use of the method of operating stations by wage-paid employees. Yet the court recognized that either of these arrangements would be legal (pp. 296, 298, 310). For that very reason Mr. Justice Douglas dissented from the outlawry of the total requirements contracts because he felt that the outlawry would lead Standard to bypass sales to the middleman entirely by adopting what he felt was the sociologically less desirable system of selling directly to the motorist through its own employees or consignees, *either of which would be legal* (p. 320). These opinions, majority and dissent, *plainly told the oil industry* that *General Electric* was still good law and was not questioned.

In the same year, 1949, Judge Forman in the *Mazda* case, *United States v. General Electric Co.,* 82 F.Supp. 753 (D.N.J. 1949) held that General Electric's consignment method of distribution was as *valid* then as in 1926.

1951: Two years later, in *United States v. Richfield Oil Corporation,* 99 F.Supp. 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 922 (1952), a case involving another aspect of requirements contracts, Judge Yankwich recognized the legality of consignment when he commented that in the case before him,

> "The operator pays for his gasoline and petroleum products *sold* to him by Richfield. *They are not merely consigned to him.*"[17] (p. 289)

1952: In *Boston Medical Supply Co. v. Lea & Febiger,* 195 F.2d 853, 856, the First Circuit held that consignees are "agents

17. Simpson's counsel in the present case has repeatedly cited this decision as somehow supporting him when in fact it does the very reverse. (App. Op. Br., pp. 1, 20, 47, 50, 51).

under the substantive provision of the antitrust laws," that while "sales contracts stipulating the price at which the buyer must resell violate the Sherman Act * * * it is permissible for a manufacturer to make a retailer his del credere agent, sending goods to the agent on consignment to be sold at fixed price. *United States v. General Electric Co.,* 1926, 272 U.S. 476 * * *."

1953: In the *Mazda* case, *United States v. General Electric Co.,* 115 F.Supp. 835 (D. N.J.) Judge Forman entered a final decree on his decision of 1949, reasserting the continued vitality of the *General Electric* rule, and the government did not appeal. In the same year in *Westinghouse Electric Corp. v. Lyons,* 125 N.Y.S. 2d 420 (Sup. Ct. N.Y. 1953), it was held that consignment arrangements were not illegal under the antitrust laws on the authority of the *General Electric* case.

1954: In *Avon Products v. Berson,* 206 Misc. Rep. 900, 135 N.Y.S. 2d 867, 874, (Sup. Ct. N.Y. 1954) it was held on the authority of the *General Electric* case that "a manufacturer may control *original* sales of his product through agents; it is only when he restricts its *resale* by others that 'restraint of trade' comes into play." (Italics in original.)

1955-1956: Union adopted and put consignment into effect. In 1956 *Westinghouse Electric Corp. v. Lyons* was affirmed in 149 N.Y.S. 2d 212, 1 App. Div. 2d 770.

1958: Judge James Carter in the *West Coast Oil* case, which had been pending from 1950, announced that even should he eventually find that the defendants, including Union, had *conspired* to fix prices, he would not order discontinuance of consignment. *United States v. Standard Oil Co. of California,* 1958 Trade Cas. ¶ 69,212 (S.D. Cal. 1958).

1959: A consent decree[18] was entered in the *West Coast Oil* case, reported in *United States v. Standard Oil Company of California, et al.,* 1959 Trade Cas. ¶ 69,399. In that case the Government had *never* contended that it was illegal for any oil company to use consignment (although, on the theory of a horizontal con-

18. A certified copy is in evidence as Def. Ex. P.

spiracy it sought at one time to prevent the defendants from selling gasoline whether through wage-paid employees, consignees or even to independent dealers). The consent decree recognized the legality of Union's consignment system, as we show below.

1963: As late as 1963 the District Court of Appeal in California held in *Shasta Douglas Oil Co. v. Work,* 212 C.A.2d 618, 28 Cal. Rptr. 190 (D.C.A. 3rd Dist. 1963) (where the Supreme Court of California denied a hearing) that "it is lawful for a consignor selling through a consignee to fix the price at which he authorizes the consignee to sell the goods of the consignor." The court cited the *General Electric* case. One of the cases cited in the *Shasta Douglas* opinion is *Gonzales v. Derrington,* 10 Cal. Rptr. 700, 717 (1961), modified on other grounds, 56 C.2d 130, 14 Cal. Rptr. 1 (Sup. Ct. Cal. 1961), which involved the nature of Union's consignment arrangement and held that Union's consignees were merely its agents.

1963: The National Conference of Commissioners on Uniform State Laws issued its First Tentative Draft of a Proposed Uniform State Antitrust Act prepared for it by the Legislative Research Center, The University of Michigan Law School, which, it stated, basically followed the federal antitrust laws. The proposition that selling through consignees who are required to follow the consignor's price direction is outside the antitrust laws was thought to be so elementary that this draft, in the comment under the definition (Section 1(2)) of "contract, combination, or conspiracy", stated that "Consignment transactions have not been included; a principal is at liberty to control the price and other terms upon which his agent may dispose of his commodities or services." (See the current 4 C.C.H. Trade Regulation Reporter ¶ 30,101.)

The consent decree in the West Coast Oil case.

Appellant quibbled below about the fact that the consent decree in the *West Coast Oil Case* assumed the legality of Union's consignment system, and he will doubtless do so in his reply brief. But *impartial observers have had no doubt whatever about*

it. For example, Mr. Justice Stewart said in *Simpson v. Union Oil Company,* 377 U.S. 13 at 30, fn. 4, said:

> "The Department's [of Justice] views are not known, because they have not been sought. Indeed, had they been sought, there is a substantial possibility *in light of the Department's recognition and tacit validation of consignment selling under the 1959 consent decree entered against the large West Coast Oil companies, United States v. Standard Oil of California,* 1959 Trade Cases ¶ 69,399, p. 75,522, *et. seq.,* that the Government would have taken the position that the rule of *General Electric* should be left undisturbed."

While this appears in a dissenting opinion, it is a statement *of fact* which the opinion of the Court did not deny. Furthermore, in view of appellant's reference to the House Small Business Committee (see p. 67 infra), we note that, in 1964, after the Supreme Court's decision, Mr. Gregg Potvin, counsel for the Subcommittee on Distribution of the House Small Business Committee, in a speech to the Antitrust Section of the American Bar Association, said:

> "The Simpson case raises many questions. *For example, consignment is expressly recognized as the legitimate means of distribution of gasoline in the Consent Decree entered in the West Coast Oil Case."* (26 A.B.A. Antitrust Section 99, 105 (1964).)

Professor Rahl of Northwestern University Law School, in "The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case", 29 A.B.A. Antitrust Section 216, 219 (1965), observed

> "The Government itself did not appear in the *Simpson* case, or file an *amicus* brief. Possibly it was reluctant to make an appearance on the matter after having agreed to a consignment price control system in a 1959 consent decree [referring to the *West Coast Oil* case]."

A certified copy of the Consent Decree in the *West Coast Oil* case is in evidence here as Def. Exhibit P. It was analyzed in Union's brief in this Court on the first appeal, in No. 17,308 (at

pp. 20-22). Its significance is that it confirms the reasonableness of Union's belief in the legality of consignment and its reliance on the *General Electric* doctrine, for Government counsel had the same belief or publicly acted as if they did.[19] It is inconceivable that otherwise, after conducting litigation for 9 years to clean up alleged evils in the oil industry, the Antitrust Division would have tolerated consignment for a single moment by provisions in the Consent Decree. Those provisions *were not simply negative, they were affirmative.* The Decree ordered Union to give a supply agreement to every lessee dealer and provided that Union would discharge that obligation by giving a consignment agreement under which it fixed the dealer's prices.

Moreover, no one reading the letter written by government counsel, Mr. Haddock, to Union's counsel on June 12, 1959, before Union agreed to the Consent Decree (part of Def. Ex. Q) can possibly read it as doing anything but recognizing the legitimacy of Union's consignment arrangement. That letter contains the following statements:

> "I have your letter of June 11 in which you ask the Antitrust Division to inform you in writing that the first clause of ¶ XI * * * should not be deemed to limit the right of defendant consignor to determine the price at which its consigned products shall be sold by a consignee.
>
> "I call to your attention * * * the definitions * * *. One of the purposes of this definition of a reseller was to make certain that Section XI would refer only to resellers and not

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19. Appellant argued below that the Consent Decree was not *res judicata* as to Simpson. We do not contend that it is, although in *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9 Cir. 1967), this Court refers to "a very perplexing problem long existing in federal antitrust law, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree". (p. 3)

We do not even claim that the Consent Decree was *res judicata* against the Government, because it provided that it should not estop the government from suing in the future to enjoin any unilateral act of any defendant in retail marketing (Par. XV (B)). That clause was a general one, not aimed at consignment, but unquestionably its effect was to prevent the Decree from so operating as to preclude the Government from attacking consignment if it ever saw fit to do so. *But it never saw fit to do so.*

to consignee dealers. In view of these facts I have difficulty in understanding why you feel that it is necessary for plaintiff to advise you in writing that the term 'reseller' means reseller as defined in the proposed decree."[20]

The discussion in case and commentary about the Supreme Court's Simpson decision recognizes that it created a revolutionary new rule.

Everybody but appellant recognizes that the Supreme Court's decision in the *Simpson* case was revolutionary and left the bench, bar and business thunderstruck; that it either overruled the *General Electric* case completely and totally, as Justice Stewart said, or else limited it so narrowly as to destroy it by purporting to confine it to patented articles.[21]

Thus in *Lyons v. Westinghouse Electric Corporation,* 235 F.Supp. 526 (S.D.N.Y. 1964), which held it to be unfair to apply the *Simpson* doctrine to consignments where the facts had occurred before the *Simpson* decision, the court also made these statements:

> "They [plaintiffs] claim that even though the contract between Westinghouse and Ledco created a bona fide agency, nevertheless the contract violated the antitrust laws. In other words, they say that the principal may not legally set the price at which his agent sells.
>
> "At the time this case was tried, *United States v. General Electric Company, supra, afforded a complete answer* to this contention. But since this case was tried, the Supreme Court

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20. Appellant below pointed to P. Ex. 74 as some sort of contrary evidence. That exhibit is a letter Simpson's counsel *stated* was written to him by Mr. Haddock nearly two years after the present suit was filed. It refers to, and discusses, only a second and formal letter written by Mr. Haddock on June 19, 1959, not Mr. Haddock's letter of June 12, 1959. And it does no more than to say that the Government did not estop itself by the Consent Decree from assailing consignment should it see fit to do so.

21. No commentator has seen any merit in that distinction, and some predict that it will not survive long. For example, in footnote 20 in *Sun Oil Co. v. Federal Trade Commission,* 350 F.2d 624 (7 Cir.), cert. den. 382 U. S. 982 (1966) the court comments that Justice Douglas' view that the existence of a patented product constituted the "ratio decidendi" of *General Electric* has been severely criticized, citing other cases and articles (p. 635). But whether the distinction survives or not, it was a new rule.

has decided *Simpson v. Union Oil Co.*, 377 U. S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964)." (p. 534)

The court then describes Simpson as announcing *"a broad and novel principle"* (p. 535) and proceeds:

"Does Union Oil overrule United States v. General Electric, supra, *at least for the future?* Although the Court in Union Oil pointed out in a footnote (377 U. S. at 23, n. 10, 84 S.Ct. 1051) certain factual differences between the two cases, *these seem comparatively minor, and I do not understand the Court to say that it considered them sufficient to create any real distinction.* The Court said plainly that the General Electric case would be limited to its special facts, and that the fact which was significant in General Electric was the existence of General Electric's patents. * * *

"Whether this amounts to overruling General Electric or merely limiting it *is a matter of semantics.* The practical effect is the same, whichever word one uses. *I cannot escape the conclusion that where no controlling patents are present, the rule laid down in General Electric, at least for the future, is no longer law."*

In *Sun Oil Company v. Federal Trade Commission,* 350 F.2d 624, 635 (7 Cir. 1965), cert. den. 382 U.S. 982 (1966), this appears:

"While we have followed the Commission in holding the decision in the General Electric case distinguishable from that now before us on the basis that we are here concerned with horizontal as well as vertical price control, *additional support for this position—not then available to the Commission—is now available to us by virtue of the recent decision in Simpson v. Union Oil Company of California,* 377 U. S. 13, 84 S.Ct. 1051 (1964). *In Simpson, the Court apparently for the first time, sustained a direct attack on the 'exception' to per se illegality of vertical price control theretofore thought to have been carved out by General Electric.* Rather than overruling General Electric expressly, however, Mr. Justice Douglas, speaking for a majority of five, chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product. Thus limited, it is

now undoubtedly the law that, with regard to unpatented products, no such 'exception' exists."

In *C.B.S. Business Equipment Corp. v. Underwood Corporation,* 240 F.Supp. 413, 424 (S.D.N.Y. 1964) the court remarked:

"But while GE may still be persuasive in determining whether an agency relationship exists under particular circumstances, it would not appear to be authority for the validity of such agency contracts under the Sherman Act except possibly in the case of patented articles.

"In *Simpson v. Union Oil Co.,* 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), *the Supreme Court has given validity to the argument, rejected in GE,* that 'the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Anti-Trust Law.' United States v General Elec. Co., 272 U. S. at 485, 47 St.Ct. at 195.

"Does the fact that the product which is distributed is a patented article, with the patent held by the distributor, alter the situation? GE said that it did not make any difference (272 U.S. at 488, 47 S.Ct. at 196), although Mr. Justice Douglas in Union Oil, believed this fact to be the *ratio decidenti* of GE distinguishing it from Union Oil (377 U. S. at 24, 84 S.Ct. at 1058). However, a patent does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. [citations omitted] Although Mr. Justice Douglas referred to the 'consignments' in Union Oil in quotes, *I do not read his opinion as a determination that a true agency in legal definition did not exist between Union Oil and its consignees,* but rather that if such agency offends the anti-trust laws it will not be accorded the status it might otherwise receive."

In footnote 2 of this *C.B.S.* decision, the Court refers to Professor Handler's article, "Recent Antitrust Developments—1964," 63 Mich. L. Rev. 59 (1964), as "an excellent analysis and discussion of the Union Oil case". Professor Handler's article stated:

"In the *General Electric* case, however, Mr. Chief Justice Taft, for a unanimous Court * * * upheld the consignor's

right to set the price at which the consigned goods might be sold to the ultimate consumer. This result was reached despite the fact that the consignor had established the resale price, had possessed great economic power, had offered its dealers no alternative distribution arrangement, and had encompassed within a vast nationwide consignment network as many as four hundred wholesalers and 21 thousand or more retailers, all of whom were independent businessmen. And, the Court went out of its way to make clear that its ruling applied to unpatented as well as patented goods. * * * no one has ever doubted that a manufacturer may control the price charged by his consignees when there is a bona fide agency.

"*No doubt was expressed, that is, until early spring of this year* when Mr. Justice Douglas in *Simpson v. Union Oil* not only questioned, but appears to have denied, the right of a consignor to set the price at which his goods are sold by his duly appointed agents. Rather than overruling *General Electric* expressly, however, Mr. Justice Douglas chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product, a distinction correctly termed 'specious' by Mr. Justice Stewart in dissent. [pp. 59, 60]

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"There is a puzzling schizophrenic quality to the Court's opinion in *Simpson*. * * * No comprehensible principle is articulated that would divide the sheep from the goats. The result is quite baffling, and one can only speculate as to what is the decisive element that tips the scale. [pp. 62, 63]

* * * * * * *

"One thing is clear. The Court does not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy, as it did in *Masonite* or as the Federal Trade Commission ruled in *Sun Oil*. Nor does Mr. Justice Douglas purport to outlaw the consignment system, as in the Commission's decision in the *Atlantic Refining* case, on the ground that it was used only 'at irregular intervals and in certain markets during price wars' and was not the regular method by which the company sold its products. Quite to the contrary, Union's program had been in effect for close to a decade and was its regular method of doing business." (p. 64)

Professor Day, of Ohio State University, in "Developments in Antitrust During the Past Year", 25 A.B.A. Antitrust Section 3, 32 (1964), refers to the *Simpson* decision and its rejection of the *General Electric* case as *"a portentous move"*, a description that could only be applied to a new and revolutionary rule of law.

Professor Rahl of Northwestern University Law School, in "The Demise of Vertical Price-Fixing Through Consignment Arrangements: The Simpson Case", 29 A.B.A. Antitrust Section 216 (1965) and "Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis", 61 Northwestern University Law Review 1 (1966), referred to the *Simpson* decision as "the demise of the General Electric Doctrine".

A comment in 2 Tulsa Law Review 55 (1965) states:

> "Businessmen have been under the assumption that the case of the *United States v. General Electric* clearly set out the federal antitrust policy and explained the law dealing with consignments. * * *
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> * * * * * * *
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> "* * * This opinion leaves many who have justifiably entered into similar agreements in reliance on *General Electric* in a state of confusion * * * [p. 57]
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> * * * * * * *
>
> "* * * As it now appears, there is no longer a criteria for determining which agreements will be upheld and which will be determined to be in violation of our 'new' antitrust policy." (p. 58)

A comment in 10 Villanova Law Review 366 (1965) states:

> "Placing the principal case [Simpson] into the formula of the previous decisions presents a formidable task. While an agreement to set the price at which gasoline was to be sold is present there was no resale agreement since the retailers were consignees. The consignment was not held by the Court to be a mere fabrication to circumvent the Sherman Act, and the only alternative explanation is that *a new rule has been formulated.* * * *
>
> "Left unanswered in the present case, to the dismay of those who may be subjected to treble damage suits, is the

determination of where the line differentiating legal and illegal consignments will be drawn. * * * [p. 368]

"Another problem created by this decision is the effect it will have on those who, in good faith, entered into consignment agreements in reliance on the rule set down in the *General Electric* case. * * * *The majority recognized that agreements might have been entered into in reliance on the General Electric doctrine and stated that the new rule would be applied in such cases prospectively.* * * *

"Here then the Court * * * *has taken away the protection previously afforded by the General Electric case* * * *." (p. 369)

A comment in 18 Vanderbilt Law Review 222 (1964), calls the *Simpson* rule "the new rule governing consignments" (p. 228).

Commentary on the *Simpson* case continues to come forth. In Joseph F. Brodley's "Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy", 19 Stanford Law Review 285 (January 1967),[22] the author tries to find an explanation of the decision in the idea of "oligopoly" which he states is beginning to enter the law, although he confesses that no such explanation was avowed in the opinion. Says Mr. Brodley (p. 320):

"Then came *Simpson v. Union Oil Co.* in which, *for the first time with relation to the facts of an actual case,* the connection was made (although not explained) between resale price maintenance and oligopoly power. *Prior to Simpson an effective method* of nationwide resale price maintenance *existed in the form of consignment agreements* (provided the manufacturer was willing to assume the legal burdens of the consignor-consignee relationship). In Simpson the *Supreme Court overturned this long-standing rule* in the context of a highly concentrated oligopoly market, seemingly in a conscious effort to control oligopoly power further."

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22. This article is cited by Mr. Justice Harlan in his concurring opinion in *Federal Trade Commission v. The Procter & Gamble Co.,* 386 U.S. 568 (1967) at 583, n.1; 586, n.5.

In footnote 170, the author adds:

> "See United States v. General Elec. Co., 272 U.S. 476 (1926). *The rule of this case had been accepted and relied on by distinguished antitrust practitioners. See* Stewart, *Exclusive Franchises and Territorial Confinement of Distributors,* Section of Antitrust Law, ABA, Proceedings at the Spring Meeting 33, 39-40 (1963)."

D. The Reprehensibility of Simpson's Own Conduct

Another factor in denying retroactivity to the new rule concerning consignment so as to give appellant a windfall is that in terms of morals and common law Simpson had obtained that possession of Union's station *by fraud and false pretenses.* He obtained possession by promising that whatever Union gasoline he chose to receive he would receive and handle as an agent and, as an agent, he would honor his principal's price instructions, all as he was obligated to do both in morals and by the California Civil Code, § 2027; *Bare v. Richman & Samuels, Inc.,* 60 C.A.2d 413, 140 P.2d 895. Except for that promise he never would have become a lessee in the first place.

One who makes a promise which he does not intend to perform is guilty of deceit and fraud. Cal. Civil Code §§ 1709, 1710.[23] California Penal Code § 532 provides that anyone who

> "by any false or fraudulent representation or pretense * * * gets possession of money or property * * * of another, is punishable in the same manner and to the same extent as for larceny * * *."

Thus Simpson was guilty, under California law, of fraud and of obtaining property under false pretenses, the property being that very possession of the service station on which his fantastic verdict

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23. Section 1709 provides:
"One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

And Section 1710 provides:
"A deceit, within the meaning of the last section, is * * *:
"4. A promise, made without any intention of performing it."

rests, for it is clear that Simpson had no intention of honoring his consignment agreement. The District Court so found. Its Findings 8 and 10 read (2 R. 544, 545):

> "8. Plaintiff executed the consignment agreement and thereby obtained the lease from Union and possession of said service station without any intention of abiding by the provisions of the consignment agreement or honoring his commitment thereunder whenever he did not wish to do so.
>
> * * * * * * *
>
> "10. By the legal principles of California contract law and by the legal principles of California real estate law, apart from application of the rule of antitrust law first announced by the Supreme Court in *Simpson v. Union Oil Company of California* on April 20, 1964, plaintiff seriously breached his contractual duties and obtained possession of defendant's service station by a promise made without any intention to perform it."

Those findings are supported by Simpson's own testimony that he had the idea that consignment was illegal before he entered into the first lease (R. 1688-95) and that when he signed the first lease and consignment agreement, he considered them as so much "crap" (R. 1695). He harbored that idea when he signed the consignment agreement in order to obtain possession of Union's service station; he intended to flout the agreement whenever it served his purpose.[24]

The lack of morals in Simpson's conduct is so obvious as to have been the subject of comment by impartial writers. Professor James A. Rahl of Northwestern University Law School, in "The Demise of Vertical Price Fixing Through Consignment Arrangements: The Simpson Case", 29 A.B.A. Antitrust Section 216 at 217, writes:

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24. Appellant argues (App. Op. Br. 49) that under general law a factor may at any time renounce an agency. But an agent, renouncing an agency, has never before had the right to impose on his principal a new relationship and keep possession of property entrusted to him by virtue of the renounced agency.

> "By one set of legal principles, Simpson had seriously breached his contractual and leasehold duties. As a consequence, he was summarily removed from the premises by a California court in a detainer suit."

Professor Rahl repeated that statement in "Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis", 61 Northwestern University Law Review 1, 4 (1966).

This Court, on the first appeal, had a similar reaction to Simpson's conduct. Its opinion, 311 F.2d 764, notes that Simpson "went into this deal with his eyes open and knew all the facts" (p. 768).

Although appellant attacks the findings, he does not deny the facts. Instead he argues (App. Op. Br. 44-46, 48, 49) that Simpson's familiarity with the consignment arrangement before he became a lessee was held by the Supreme Court to be irrelevant.[25] Here, as throughout his brief, *appellant confuses facts and holdings relevant to the question of what should be the new rule of law with the entirely different question of relevance to the equity issue whether the new rule of law should be retroactively applied.* Of course, if anyone were *now* to act as Simpson did, antipathy to the lack of morals in that conduct would have to succumb to the supremacy of the Sherman Act as now declared. But the issue in the instant case *is the equity or fairness of applying that rule to the events of 1956-1958.*

E. Answer to Miscellaneous Arguments of Appellant

Repeatedly appellant makes arguments that overlook the difference between facts relevant to the Supreme Court's announcing the new rule and facts relevant to the question whether that rule should be applied retroactively.

1. ALLEGED "COERCION"

Typical of appellant's confusing unlike matters is his argument that Union used consignment "coercively" (E.g., App. Op. Br. 38,

25. This is the subject matter of his Specification of Errors No. IV D (App. Op. Br. 12).

40). The Supreme Court's decision does use the term "coercion". But the slightest consideration shows that what that Court meant by "coercion" was just as present in *General Electric* as here. All the commentators on the *Simpson* case agree that the notion of "coercion" cannot distinguish *Simpson* from *General Electric.*

The District Court found (Finding 7, 2 R. 544):

> "7. Except in the sense hereafter specifically described, at no time did the defendant subject the plaintiff to any compulsion, duress or coercion, and plaintiff was in no way coerced or compelled to become or remain a dealer of defendant, a lessee of defendant, or to execute a consignment agreement with defendant. Before becoming a lessee and before executing the consignment agreement, plaintiff knew that the defendant was not willing to merchandise its branded gasoline through service stations owned or leased by it except through the agency of consignees and that, unless he was willing to execute a consignment agreement, it was not willing to lease its station to him. Plaintiff had entire freedom of choice and fully exercised free judgment either to contract with defendant on terms mutually agreeable to the two contracting parties or, if the terms on which defendant was willing to contract and upon which it was willing to give possession to plaintiff were not agreeable to him, to refrain from contracting. Only in the sense and only if it be concluded that refusal to deal with plaintiff or to grant him a lease on other terms or efforts to have defendant honor his commitments under what was honestly believed by defendant to be a lawful agreement constituted coercion can it be said that defendant coerced the plaintiff."

That finding is supported by the facts summarized in this Court's opinion on the first appeal, 311 F.2d 764 at 768, and by the stipulation which forms a keystone in appellant's case.[26]

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26. In the pre-trial proceedings leading up to the stipulation of facts upon which the Supreme Court based its decision, Simpson's counsel stipulated that the only "coercion" was Union's refusal to deal except on terms acceptable to it. The following colloquy occurred (First R. 379, 380) and was read by Simpson counsel at the trial (R. 262-3):

> "Mr. Lasky: * * * when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept

Nothing in the further record at the trial disturbed these facts. Stripped of verbiage, Simpson's grievance is that he wanted to do business with Union, but it refused to do business with him on *his* terms. He wished to occupy *its* property and sell *its* gasoline but on *his* own terms. Union informed Simpson of the basis on which it wished to merchandise its gasoline on premises owned by it, and he accepted the terms.

What Simpson calls "coercion" is simply the position taken by Union that if Simpson wished to contract with it or to acquire a leasehold in Union's property. Union would deal with him only on terms satisfactory to itself. The Supreme Court has chosen to call *that* "coercion". Therefore, it must be deemed *for the future* that the facts are of the kind described as "coercive" in whatever sense is necessary to make consignment illegal *from and after April 1964,* if coercion in any sense is indeed necessary to that end. But the use of the term is not a fact that can distinguish the

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a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

"The Court: That is precisely what you mean by the word 'compel'?

"Mr. Keith: *This statement is correct.*"

It may be added that nothing compelled Simpson to obtain gasoline from Union, even after becoming a lessee. The fact—stipulated by Union for the purpose of the case—that it would lease its realty only to one who would execute a consignment agreement—was not a tie-in within the meaning of any of the cases. By signing a consignment agreement a lessee did *not* agree to take *any* quantity of gasoline *at all* from Union, nor did he preclude himself from obtaining gasoline from anyone else. The consignment agreement merely specified the terms on which any gasoline the lessee *saw fit to take from Union* would be handled (P. Ex. 57, ¶ First). In short, concurrently with leasing a station Union was informing the lessee that it would not be selling gasoline to him and that, if he should obtain gasoline from it, he would be doing so as an agent. After signing the agreement, he was still free to get his gasoline elsewhere. See the opinion of this Court on the first appeal, *Simpson v. Union Oil Co.,* 311 F.2d 764, at 766, bottom of first column.

General Electric case. As Professor Handler in 63 Mich. Law. Rev. 59 said:

> "Many times in his opinion, Mr. Justice Douglas characterizes the consignment as 'coercive'. But he never pauses to explain how he reaches this conclusion or to indicate the sense in which this term is used. He speaks of dealers having been deprived of 'the exercise of free judgment whether to become consignees at all, or remain consignees,' but the court of appeals emphasized that Simpson was completely aware of Union's consignment policy and had entered into the arrangement as a 'result of his own free and deliberate choice.' The Court refers to no evidence of any compulsion or duress practiced upon Simpson or any other dealer. If Mr. Justice Douglas had in mind the disparity of economic power between the oil company and its dealers, the fact, of course, is inarguable, but the conclusion is a *non sequitur*. No court has ever proclaimed that inequality of bargaining power connotes coercion as a matter of law. Any such ruling would cast an ominous shadow over countless commercial arrangements.
>
> "* * * The highest Court, with its immense powers, can by sheer fiat stigmatize even the most innocuous arrangement as unlawful, but it cannot repeal the laws of logic or alter the meaning of the English language. That the shortness of the term of the dealer lease is but a makeweight is irrefutably attested by the blanket condemnation of Union's agreements with 1,327 non-lease consignees. In affixing its label of coerciveness to Union's consignments, the Court nowhere differentiates between lessee and non-lessee dealers." (pp. 64-5)

As the last passage recalls, 1,327 of Union's consignees had no leases from Union, but had their own stations. But the Supreme Court struck down all Union's consignments. *Thus the element of a "lease" was not the ground of the Court's decision.* The decision rests on an overruling of *General Electric*. Moreover, until the Supreme Court spoke, no one would have supposed that a connection with a lease was any distinguishing element. Indeed, the Consent Decree in the *West Coast Oil* case explicitly provided (D. Ex. P) for an express cross-conditioning of lease and consignment. That Decree required Union to offer its dealers both a supply agreement, which could be a consignment, and a lease (¶ XII

(B)), provided that each could specify that it would be terminated for breach of any provision, and that (¶ XII(D))

> "Where a dealer holds such an agreement and such a lease covering the same location each or either of them may provide in substance or effect that a breach of one shall constitute a breach of the other and/or that the cancellation or termination of one shall be effective to cancel or terminate the other."

It is not conceivable that the Government would have consented to this provision, or that the District Court would have approved it, if this kind of arrangement was then thought to be some kind of coercion. And Union cannot now be condemned as having been irrational for not supposing that the presence of a lease destroyed its right to sell its gasoline by consignment.

Professor Rahl said of the *Simpson* decision (29 A.B.A. Antitrust Section 216):

> "Although thus failing to provide a tight analysis at this critical point, the opinion did go on to emphasize two reasons for its condemnation of the Union plan, neither of which need be present in all consignments. These were (1) that the Union plan was 'coercively used,' and (2) that the plan had an 'inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal "consignees" who are in reality small, struggling competitors seeking retail gas customers.' When the 'consignment' device is used, said the Court, 'to cover a vast gasoline distribution system, fixing prices through many retail outlets' . . . then 'the antitrust laws prevent calling the "consignment" an agency,' immune from antitrust violation. (It should be noted that in the last-quoted sentence, the Court said that this evidently valid consignment plan was not an 'agency.')
>
> "* * * *The GE plan could not possibly escape the very same characterizations given above as the Court's second reason.* The only possible difference might be in the first reason that the lease cancellation privilege in *Simpson* gave Union Oil somewhat more coercive power over its dealers than that possessed by General Electric.[27] The latter's dealers, being

27. There was, in fact, no "lease cancellation privilege in *Simpson*." Union did not cancel a lease; it simply did not give a new one.

general merchants, normally would not be as dependent upon GE for their livelihood as the service station operators were upon Union. *The Court itself, however, did not offer any such distinction, probably because it is extremely thin on its face.*" (p. 221)

* * * * * * *

"In any event, a long life cannot be predicted for this 'coercion' theory for the simple reason that it does not make good antitrust sense. * * * [p. 222]"

And in 61 Northwestern Law Review, at page 3, Professor Rahl states that in *Simpson*

"* * * the Court placed some reliance upon the presence of what it treated as 'coercion' of the dealers concerned." But it ". . . *found 'coercion' in the simple fact of the exercise or attempt to exercise ordinary business bargaining power.* * * *"

And further:

" * * * But the Court refrained from express, critical reliance on factual differences between the consignment-agency aspects of the two plans [*General Electric* and *Union Oil*] *because, we shall assume, they were indeed too similar to support a different outcome antitrust-wise.* [pp. 5-6]

"In any event, will not coercion in the sense involved in *Simpson* almost always be present where vertical price controls are being used with competing dealers? The opinion did not really describe the facts supporting the conclusion that coercion was involved; but apparently it amounted to no more than ordinary insistence upon the consignment form of contract, and exercise of the legal power of severance of business relations for its breach. It is hard to see how any manufacturer could hope to maintain the uniformity needed to control the prices of competing dealers through consignment, without insisting that the method be used." (p. 9)

The comment in 2 Tulsa Law Journal 55 at 56-7 states:

" * * * From the Court's opinion we are forced to assume that a true agency relationship existed in the form of a valid consignment agreement. Nevertheless, the Court held that the agreement violated the federal antitrust laws. The Court uses

the word 'coercive' in certain instances when describing the Retail Dealer Consignment, however, the question of whether the agreement was coercively entered into did not appear to be a factor in finding the 'consignment' to be a violation of the federal antitrust policy."

A comment in 37 University of Colorado Law Review 293 (1965) states:

"One key to the decision in *Simpson* was the holding of the consignment as 'coercive.' *However, under the Court's previous tests Union Oil's plan was neither 'coercive' nor different from other sanctioned plans.* Under the *General Electric* test there was a clear agency in *Simpson* * * *. *Yet the arrangement in Simpson comes much closer to being a true agency than the one in General Electric.* Simpson's acceptance of the lease and consignment agreements, with full knowledge of their implications, would seem to remove *the 'coercion' aspect when the hardships involved are seen as the mere enforcement of that for which Simpson bargained.* Union Oil obviously reserved no more power over Simpson than did General Electric over its retailers." (p. 294)

A comment in 17 Stanford Law Review 519, 521-23 (1965) states:

"The *Simpson* opinion assumes throughout that Union 'coercively laced' its dealers into becoming consignees. Clearly Union's policy was to lease stations, whenever possible, only when the lessee would also enter into a consignment contract. * * * Where the manufacturer distributes directly to the retail outlet, as in *Simpson,* no boycott issue is raised. Secondly, *application of the illegal coercion theory in the refusal-to-deal doctrine to a consignment situation is unprecedented and somewhat anomalous.* Implicit in the refusal-to-deal concept is a *sale* by a supplier to a wholesaler or retailer, in which any coercion is properly reprimanded. *But where the parties have voluntarily entered into the relationship of principal and agent, the coercion rationale is less appropriate because the agent will have accepted the restriction on his freedom to deal with the goods that this relationship entails.* Since Simpson had operated a service station only as a con-

signee of Union, and never as an independent retail seller, application of an even more general coercive practice rationale, as *Simpson* seems to find in *Parke Davis,* is unwarranted."

The Stanford Law Review article goes on to suggest that because the *Simpson* case involved a lease and *General Electric* did not, Union Oil's consignment *was more legal* than *General Electric's,* because Union's consignees were obviously Union's agents in every real sense. When a critic can come to that conclusion, it is self-evident that Union was justified in not supposing that the element of lease had any relevance at all to the legality of its consignment.

2. ALLEGED DIFFERENCES BETWEEN THE CONSIGNMENT AGREEMENTS IN THIS CASE AND GENERAL ELECTRIC.

Appellant also attempts to distinguish the *General Electric* from the *Simpson* case on the basis that there were differences between the two consignment arrangements (App. Op. Br. 43). But, as the District Court here found (Finding 3, 2 R. 542):

> "The form and substance of the consignment agreement devised and thereafter used by defendant were modeled upon and were substantially the same as the consignment agreement and arrangement of the General Electric Company which had been upheld in said *United States v. General Electric Co., supra,* and like the consignment agreement and arrangement used by *General Electric Co.* and involved in that case was true and *bona fide.*"

Appellant does not indicate why any differences that existed should have any relevance, and the differences were trifling. Appellant's assertions on the subject are either incorrect or pointless.

Thus appellant states that *General Electric* "assumed all the risks of the fire, flood or obsolescence, whereas Union did not." But Union assumed the risks of "fire, explosion, earthquake, lightning, flood" (Consignment Agreement, P. Ex. 57, ¶ "Second (6)"), and obsolescence is inapplicable to gasoline. Appellant states that General Electric paid all taxes assessed on the stock

of lamps, whereas Union Oil Company paid only property taxes. But "taxes assessed on the stock of lamps" and "property taxes" are synonymous. The taxes Union's consignees had to pay were taxes on their businesses and operations; no more did General Electric assume such taxes. Appellant argues that "General Electric carried whatever insurance is carried on the stock held by the consignees whereas Union Oil Company apparently was not required to carry any insurance." But Union did *not* require the consignee to cover the "stock", i.e., the gasoline, with insurance. Since Union remained the owner, it assumed all the risks of the kind against which one might wish to insure, and whether it protected itself by insurance or not was no concern of the dealer. The only insurance Union's consignees were obligated by the agreement to carry was in connection with an indemnification of Union against liabilities for damages to persons or property "occurring in connection with the conduct of his [the consignee's] business" (Ibid., ¶ "Second (4)").

Not a single case or commentator agrees with appellant that there was any relevant difference between the consignment setup in *Simpson* and that in the *General Electric* case. The majority opinion in the Supreme Court in the *Simpson* case acknowledged that the General Electric plan "somewhat parallels" Union's plan (377 U. S. 13, 22). In a footnote it mentioned a few differences but attached no significance to them. Mr. Justice Stewart's opinion observes:

> "The fact of the matter is * * * the two agreements [GE and Union] are virtually indistinguishable."[28] (377 U.S. at 26)

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28. He added, in footnote 1:

> "Without commenting on their significance, the Court does purport to discover in the operative provisions of the two agreements factual differences regarding the tax and insurance burdens assumed by the consignors. On closer examination, however, even these purported differences disappear. From the records in the cases, it is clear that both companies assumed the same tax burden—payment of property taxes on the consigned goods. And since both companies bore virtually the same insurable risks of loss or damage to the goods consigned, the fact that General Electric apparently 'carried "whatever insurance is carried" on the stock held by con-

Professor Rahl characterizes the majority's reference to differences between the General Electric plan and the Union plan as "toy[ing] inconclusively with a few differences" (Rahl, 61 Northwestern Law Rev. 1, 5; also 29 A.B.A. Antitrust Section 216, 219) and says:

> "But the Court refrained from express, critical reliance on factual differences between the consignment agency aspects of the two plans, presumably because they indeed were too similar to support a difference antitrust-wise." (*Id.* at 219.)

17 Stanford Law Review 519, 521-2 remarks that the differences between the General Electric and Union contracts "were so minute as not to constitute adequate ground for distinguishing the cases"; indeed that the two were "so strikingly similar" as to show reliance.

At p. 47, supra, we quoted a passage from *Lyons v. Westinghouse Electric Corp.,* 235 F.Supp. 526, 535 (S.D.N.Y. 1964), that the factual differences between the two plans pointed out by the majority were "comparatively minor, and I do not understand the Court to say that it considered them sufficient to create any real distinction." Whatever the differences were, they did not render Union's consignment system any less a true agency than *General Electric,* and all the cases and commentators agree that the Supreme Court did not hold Union's not to be a true agency. It merely held that ordinary concepts of law have to give way to antitrust concepts and in this respect simply overruled *General Electric.* In an address to the Antitrust Section of the American Bar Association, "Relationships of Antitrust to Conventional Legal Categories", 26 A.B.A. Antitrust Section, p. 144 (1964), Mr. Paul C. Warnecke, later General Counsel of the Department of Defense, stated (p. 146) that the *Simpson* case

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signees, while Union Oil apparently is not obligated to carry any insurance' is no distinction at all.

* * * * * * *

"* * * The Court in *General Electric* explicitly observed that a provision placing the burden of risk of loss or damage to goods on the consignee 'is only a reasonable provision to secure [the consignee's] careful handling of the goods entrusted to him.' Id., at 484."

> "involved what the majority opinion agreed was a perfectly valid consignment * * *. But the Supreme Court stated: 'a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy.' "

3. NONE OF THE CASES CITED BY APPELLANT IS RELEVANT.

Appellant asserts (App. Op. Br. 42, 50) that Union had no right to rely on the *General Electric* case in view of *United States v. Masonite Corp.,* 316 U. S. 265 (1942). Professor Handler, in his discussion of the *Simpson* case, "Recent Antitrust Developments—1964", 63 Mich. L. Rev. 59, 64 says:

> "One thing is clear. The Court did not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy, as it did in *Masonite* * * *."

No method, however legal it is when done unilaterally, can validate a horizontal price fixing conspiracy between competitors, which is all that *Masonite* held.

Appellant (App. Op. Br. 47, 50, 51 and elsewhere) belittles the study of the law made by Union's General Counsel because he did not attach significance to *United States v. Richfield Oil Co.,* 343 U.S. 922 (1952) and *Times Picayune Pub. Co. v. United States,* 345 U.S. 594 (1953). In like manner appellant cites the old workhorses of the antitrust law, *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150 and *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U. S. 441. *Richfield, Times-Picayune* and *Beech-nut* are so irrelevant that, although cited in Simpson's brief in the Supreme Court, they were not even mentioned in that Court's opinion. *Socony Vacuum* is merely the basic case on price fixing and has no bearing on whether consignment is "price fixing". *United States v. Parke-Davis & Co.,* 362 U. S. 29, also cited, involved conspiracy with wholesalers and did not involve consignment.

Finally, appellant (App. Op. Br. 55) cites the Federal Trade Commission's proceedings against *Sun Oil Company* and its proceedings against *Atlantic Refining Company* as a reason why

Union could not rely on the *General Electric* doctrine. There was no decision in *Sun,* and there was not even a complaint filed against Atlantic, until after Simpson's lease had expired and he had left the premises.[29] And the charges in the two cases were quite foreign to what Union was doing. The complaint in *Sun* made two charges (P. Ex. 81): (1) that Sun's arrangement was not in fact a consignment but "a fiction and a subterfuge" (Id., ¶ 4, p. 3), and (2) that Sun and others had entered into a combination and agreement to fix prices (Id., ¶ 5, p. 4). It did not assert that a *bona fide* consignment was unlawful or cast any doubt on the principle that, absent a horizontal conspiracy, consignment was valid. If it had been thought that *General Electric* was no longer good law, the allegations of subterfuge and horizontal conspiracy would have been unnecessary surplusage. That the Commission proceeded against Sun (and later Atlantic) upon charges of *fictional* consignment used to cloak a horizontal conspiracy *and never proceeded against Union* is plain evidence that the Commission did not even find an "unfair method of competition", much less a Sherman Act violation, in Union's consignment.[30] In its eventual decision the Commission said, "* * * Sun, unlike *United States v. General Electric Co.,* 272 U. S. 476 (1926) did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements * * *" (1963 C.C.H. Trade Reg. Rep. ¶ 16,418, p. 21,279).

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29. The initial decision of the Commission's hearing examiner in *Sun* was issued May 17, 1962, four years after Simpson vacated the premises. (1962 C.C.H. Trade Reg. Rep. ¶ 15,909). The opinion of the Commission was issued May 15, 1963 (1963 C.C.H. Trade Reg. Rep. ¶ 16,418), and the case was decided in the Court of Appeals on August 19, 1965, *Sun Oil Company v. F.T.C.,* 350 F.2d 624 (7 Cir.).

The Commission's complaint in *Atlantic* was filed on April 24, 1959 (1959 C.C.H. Trade Reg. Rep. ¶ 27,964.), about a year after the facts of this case were history.

30. In the *Sun* case the hearing examiner found on the evidence that (1962 C.C.H. Trade Reg. Rep. p. 20,725):

> "the agency consignment agreement was a fiction or subterfuge, not a bona fide agency and in fact constituted an agreement or conspiracy among Sun and its dealers to fix resale prices * * *."

Professor Handler, in his article in 63 Mich. L. Rev. 59, 64 (1964), states of the Supreme Court's decision in *Simpson:*

> "One thing is clear. The Court does not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy as * * * the Federal Trade Commission ruled in *Sun Oil.*"

And when the Seventh Circuit affirmed the Commission's *Sun Oil* decision in 1965, *Sun Oil Co. v. F.T.C.,* 350 F.2d 624, cert. den. 382 U. S. 982 (1966), it recognized that the *Simpson* decision went far beyond *Sun.* At p. 47, supra, we quote the relevant passage from that opinion.

The decision of the Commission's hearing examiner in *Atlantic* rendered on March 7, 1962, held that Atlantic's consignment agreements were *lawful* because they were within the principles of the *General Electric* case (1962 C.C.H. Trade Reg. Rep. ¶ 15,786, p. 20,601). When the Commission reversed the Examiner, it did so on the basis of a finding that Atlantic was conspiring with its wholesale distributors, *who were purchasers, not consignees,* to fix retail prices and did not truly consign to its retailers at all but shifted back and forth from day to day between "consignment" and "sale" when necessary to carry out the conspiracy with the wholesalers (1963 C.C.H. Trade Reg. Rep. ¶ 16,422 at p. 21,289). Professor Handler, 63 Mich. L. Rev. 59, 64, states:

> "Nor does Mr. Justice Douglas purport to outlaw the consignment system, as in the Commission's decision in the *Atlantic Refining* case, on the ground that it was used only 'at irregular intervals and in certain markets during price wars' and was not the regular method by which the company sold its products. Quite to the contrary, Union's program had been in effect for close to a decade and was its regular method of doing business."

The Supreme Court's decision in the *Atlantic* case (*Atlantic Refining Co. v. Federal Trade Commission,* 381 U. S. 357) was rendered in 1965, one year after its decision in the *Simpson* case, as was *Federal Trade Commission v. Texaco,* 381 U. S. 739.

4. IRRELEVANCE OF INTERIM REPORTS OF HOUSE SMALL BUSINESS SUBCOMMITTEE.

Appellant refers to two Interim Reports of the so-called Roosevelt Subcommittee of the House Small Business Committee, P. Ex. 75 for identification, dated July 26, 1955 and P. Ex. 80 dated August 14, 1957 (App. Op. Br. 52). The Interim Report of July 26, 1955, says nothing about the legality of consignment. The Report of August 14, 1957 recommended that:

> "4. The Department of Justice investigate the present influence of consignment, commission, and *company-operated stations* in *price leadership,* maintenance or fixing, or in price discrimination against independent lessee-dealers, as *possible* violations of the antitrust laws." (p. 17).

This was no more than a request to investigate whether consignment was being used as part of a *conspiracy,* for it speaks of company operation in the same breath. Nothing in that passage could charge Union with knowledge that seven years later the Supreme Court would hold that Union's *unilateral* use of consignment was unlawful.[31]

The recommended investigation by the Department of Justice of what part, if any, consignment played in violation of the antitrust laws was in fact made in the *West Coast Oil* case. In the course of that investigation, the Department and the court were fully informed of Union's consignment, as Judge James M. Carter's opinion of October 12, 1958 reflects, *United States v. Standard Oil Company of California,* 1958 Trade Cas. ¶ 69,212. Then, having conducted the investigation requested, the Department agreed to and the court entered its final decree expressly authorizing Union to enter into consignment agreements in discharge of

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31. It would be as logical to argue that Standard Oil Company should then have discontinued company operation of stations, or that large merchants should now cease advertising because on June 6,1966, the Chief of the Antitrust Division stated to the Federal Bar Association (5 Trade Reg. Rep. p. 55,207):

> "a number of business practices have been attacked as imposing unacceptable restraints on competition. . . . heavy advertising outlays lead both to more concentrated market structures and to the establishment of high monopolistic prices . . ."

the obligation imposed by the decree to give supply agreements. As we have seen (p. 44, supra), counsel for the Small Business Committee has said that "consignment is expressly recognized as a legitimate means of distribution of gasoline in the Consent Decree entered in the *West Coast Oil* case."

II.

DEFENDANT'S MOTION FOR A NEW TRIAL WAS PROPERLY GRANTED

The jury returned a verdict of $160,000 single damages, a sum which invested at 5% would yield an annual return of $8,000 without any diminution of principal. Simple interest alone would enable Simpson, an able-bodied man, to retire and receive an annual income greater than any he had ever before earned, and then leave a small fortune to his heirs. Trebling the verdict to $480,000 would be trebly fantastic. In the words of the trial court (R. 1803):

> "After the verdict was returned and I left the courtroom I was shocked with it just as I am now. There was more speculation, guesswork and conjecture in making up the sum of $160,000 than I have ever experienced with a jury and a return of a jury verdict . . . ."

For this and other very substantial reasons a new trial was granted

> "on the grounds that the verdict is against the weight of the evidence, shocks the conscience, is grossly and monstrously excessive, is the result of either passion or prejudice or of consideration by the jury of factors irrelevant to the litigation, is speculative, conjectural and a miscarriage of justice." (2 R. 550)

A. Principles Governing Grant of New Trial: the Trial Court Has the Right and the Duty to Weigh the Evidence and to Set Aside the Verdict as Against the Weight of the Evidence or as a Miscarriage of Justice

The grant or denial of a motion for a new trial rests within the sound discretion of the trial court and will not be overturned unless a clear abuse of that discretion is shown. *Oswald v. Cruz,*

289 F.2d 488 (9 Cir. 1961); *Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 249 F.2d 246, 256 (9 Cir. 1957), *cert. den.* 348 U.S. 952. This discretion is vested in the trial judge, for it is he "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart," and to present him with "an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 216 (1947).

Appellant contends that the verdict was "well within the range of lost values to Mr. Simpson for the destruction of his business" (App. Op. Br. 61). Even if true, and it is fantastically false, it is an irrelevant statement misconceiving the governing principle.

Appellant quotes (App. Op. Br. 62) general language respecting jury verdicts from *Liquid Veneer Corp. v. Smuckler,* 90 F.2d 196 (9 Cir. 1937) and other cases.[32] But in each of these cases a new trial was *denied,* not granted. Where the trial court in its discretion has refused to grant a new trial, this Court has traditionally been reluctant to interfere. See, *e.g., Union Pacific R. Co. v. Johnson,* 249 F.2d 674 (9 Cir. 1957) *rev'd on other grounds* 352 U.S. 957; *Southern Pacific Co. v. Guthrie,* 186 F.2d 926 (9 Cir. 1951) *cert. den.* 341 U.S. 904; *Southern Pacific Co. v. Zehnle,* 163 F.2d 453 (9 Cir. 1947). But here the motion was granted, and properly so.

The trial court's responsibility in ruling on a motion for a new trial was set forth by this Court in *Moist Cold Refrigerator Co. v. Lou Johnson Co., supra,* 249 F.2d at 256:

> "But having permitted the jury to come to its conclusion on the facts, the trial judge then *had the right, and indeed the duty, to weigh the evidence as he saw it,* and to set aside the verdict of the jury, *even though supported by substantial evidence,* where, in his conscientious opinion, the verdict is contrary to the weight of the evidence or based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice."

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32. *Peterman v. Indian Motorcycle Co.,* 216 F.2d 289 (1 Cir. 1954) and *Mainelli v. Haberstroh,* 237 F.Supp. 190 (M.D. Pa. 1964).

Appellant contends for a rule identical with that governing a motion for judgment notwithstanding the verdict. That is not the law. A judgment notwithstanding the verdict is improperly granted where there is evidence to support the jury's verdict, but as stated in *Williams v. Nichols,* 266 F.2d 389, 393 (4 Cir. 1959):

> "In passing upon the motion for a new trial and in considering the evidence in the light most favorable to the plaintiff, the trial court applied the standard applicable to a motion for a directed verdict or judgment n.o.v., rather than exercising his own independent judgment after a weighing of *all* the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice.
>
> * * * * * * *
>
> "The case is accordingly remanded for reconsideration of the motion to set aside the verdict and for a new trial, not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the *trial court* of the weight of all the evidence . . ." (Emphasis in original)

B. The Verdict Was Manifestly Excessive and Unsupported by the Evidence

As appellant recognizes by limiting his argument (App. Op. Br. pp. 60-61), if any substantial sum of damages is to be justified, it must be on the basis of Union's refusal to give appellant another lease.[33] We accordingly confine our discussion to that question, assuming, for purpose of argument, that Union's refusal furnished a legal basis for a claim of damage. Appellant's damage theory is that he had a business which Union's refusal to lease destroyed, and that this business had enormous value (App. Op. Br. 60, 61). The theory is false, the business had no value, and appellant sustained no damage.

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33. All other damage claims were trivial afterthoughts, i.e., an alleged loss of $119.05 on the sale of equipment (P. Ex. 59, 62 and R. 667-69); that a filing cabinet for which he paid $140 became valueless (R. 651-52); that Simpson was "overcharged" $331.34 for gasoline (R. 658-63); and that if he had at all times received a "net margin" of 6¢ per gallon on those days when he did not, and had sold the same amount of gasoline, he would have grossed an additional $1,000.94. (P. Ex. 63).

1. THE UNDISPUTED FACTS.

For two years beginning May 23, 1956 Simpson leased Union's station. His earnings experience in that period fairly reflects the station's earning capacity. It had been an up-and-going concern for eight months when Simpson began operating it without any closedown. (D. Ex. J, R. 804). Simpson's "profit and loss" statements, both those *in extenso* (P. Ex. 58) and a tabulation (D. Ex. M), show that under his operation sales of gasoline at the station averaged 12,531 gallons per month. In the entire 11 years' history of the station up to the time of trial, Union's deliveries of gasoline to the station averaged only 13,560 gallons per month. (D. Ex. J).

After Simpson's lease expired in May 1958, Simpson remained in possession of the station until June 5, 1958 under a temporary restraining order. He then moved to a Mobil station which he operated for about two years. (D. Ex. K). On June 28, 1960 he left this Mobil station, voluntarily and before his lease there expired. (R. 876). Since leaving the Mobil station, appellant neither sought to obtain a dealership at any service station nor had he any desire to become a dealer for any oil company. (R. 876).

Appellant's "profit and loss" statements show that his take-home averaged $473.43 per month from the Union station and $476.95 per month from the Mobil station. (D. Ex. K, p. 1)[34] *But these figures represent no profits, for they make no allowance whatever for the value of Simpson's labor.* (R. 966). That is, a "profit" figure in appellant's "profit and loss" statements represents nothing but the excess of receipts over disbursements *before* Simpson paid himself anything for his work. During his first year at the Union station, appellant worked there 17 hours per day, 7 days per week. During the second year, he worked 12 hours per day, 7 days per week. (R. 586-587). In company-employee operated stations of the same size as that leased to Simpson, Union paid its managers $400-$420 per month for a 40-hour week, plus

34. His income tax returns show the figures as $401.33 per month and $468.61 per month, respectively (D. Ex. K, p. 2).

fringe benefits amounting to an additional $80 per month. (R. 512-513). This amounts, conservatively, to $3.00 per hour. It is therefore obvious, and the testimony of an experienced certified public accountant, that *there were no net profits* in this business and, accordingly, that the business had no value aside from the value of the inventory and equipment.[35] (R. 959-960, 981-984). This analysis of the matter was fully confirmed by Dr. Frank L. Kidner, professor of economics at the University of California. (R. 1021, 1051-1055).

Upon voluntarily quitting the Mobil station and the service station business, Simpson decided to become what he calls a physiotherapist (R. 876) and what his income tax returns call a masseur. These returns (D. Ex. I), show the following earnings from this endeaver:

1963	$4,870.68
1964	4,795.76
1965	5,136.65[36]

2. APPELLANT'S DAMAGE THEORY AND THE PAGLIN NUMBERS.

Appellant seeks to support his theory by various computations performed by Professor Paglin of Portland State College, all of which are premised on (1) the speculative premise that appellant would have continued to operate the station until he reached age 65, 24 years later, and on (2) the premise that the business generated actual net profits. Both premises are false.

The first is untrue because Simpson voluntarily quit the service station business two years after leaving the Union station. Here, as in *Seattle First National Bank v. Hilltop Realty,* 383 F.2d 309,

35. Which appellant sold to the lessee who replaced him. (R. 866-867).

36. From the time he left the Mobil station at the end of June, 1960, until 1963, *i.e.,* while Simpson was learning this new trade, Simpson's returns showed no income to him in 1960, $29.49 in 1961 and $1,606.58 in 1962. But the decision to learn this new trade was Simpson's. That he chose to abandon the Mobil station, where he was earning some $5,600 per year, and thereby sustain a temporary loss of earnings, is certainly not Union's responsibility.

312 (9 Cir. 1967), *cert. den.* ..... U.S. ..... (4/22/68), 36 U.S. Law Week 3404, the *actual events* are before the Court and there is no possible room for speculative prognosis, for "the proof of the pudding is in the eating." Or, as stated in *Independent Iron Works v. United States Steel Corp.*, 177 F.Supp. 743, 747 (N.D. Cal. 1959), *affirmed* 322 F.2d 656 (9 Cir. 1963), *cert. den.* 375 U.S. 922:

> "One must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened.

At no time did Professor Paglin testify that any of the figures generated by him represented the value of appellant's business.[37]

Professor Paglin did nothing but compute the present value of various sums of money which Simpson might have earned by working in the station over a 24-year period. Thus, if one assumes that Simpson's labor would have produced for 24 years what it did in calendar year 1957 ($6,388), an amount of $97,388 is reached. If one averages Simpson's earnings for the three months at the Union station when they were highest,[38] one arrives at $809 per month or $9,700 per year which, over 24 years, amounts to $147,895. In the words of Professor Paglin (R. 765):

> "In other words, if he went to an insurance company and tried to buy what we call an annuity that would pay him $9,700 a year until his retirement, which is the amount he would have earned, let's say, had he continued in the station, the insurance company would sell him such an annuity for $147,895, approximately."

If this were relevant data in a wrongful death case, it is no evidence whatever of the value of a business. (R. 983). Simpson's

37. P. Ex. 68, which refers repeatedly to "value of business", was admitted on the representation that it was merely a summary of Paglin's testimony. (R. 758). But it is not.

38. Which is obviously absurd (R. 984), particularly when the months are June, July and August, and the station is on the main highway to Sequoia National Park. (R. 577). The absurdity is demonstrated by the fact that the very next month, September, 1957, Simpson earned only $224.52 (D. Ex. K).

age and "remaining useful life" (App. Op. Br. 22) were as irrelevant to the value of his business as they were to the value of his house or his car.

In *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9 Cir. 1957) *cert. den.* 356 U.S. 975, this Court had before it the question of valuing a retail gasoline business. There, as here, the operator was 41 years of age at the time he allegedly could no longer obtain gasoline and there, as here, the claim was that he wanted to continue operation. There, the operator owned the land and other capital assets of the business and retained them when he went out of business. Here, appellant owned nothing except his inventory and equipment, which he sold. This Court said (251 F.2d at 219-220):

> "It was Moore's contention that his business had been totally destroyed on August 15, 1952, when he could no longer obtain gasoline. He therefore asked the jury to measure his damages by the market value of the business on that date. Moore owned the land and the other capital assets of the business, and retained them when he went out of business. It follows that the only value which his business had before it was closed that it did not have afterwards was its 'going concern' or 'good will' value.
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> "As one means of proving going concern or good will value, Moore produced the opinion testimony of an expert witness. The hypothetical question asked of this witness included, as one of its assumptions, that in August, 1952, Moore was forty-one years of age, was in reasonably good health, and wanted to continue the management of the service station. Appellants argue that the question, as so framed, was irrelevant to the issue.
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> "We agree. In measuring the value of the good will of such a business, appropriate factors to be considered are: (1) *What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?* (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation? See Kimball Laundry Co. v. United States, 338 U.S. 1, 16-17, 69 S.Ct. 1434, 93

L.Ed. 1765. These are the factors which would influence a prospective purchaser. The special value which the business might have to Moore, or the profit potential of the business beyond that which would be transferable to a purchaser, would have no effect on the market value of the business. Upon the retrial, the question should be framed to omit this irrelevant factor."[39]

The question reduces itself to this: When Union charges a dealer nothing to obtain a service station lease,[40] would anyone pay another lessee $160,000 for the privilege of working 12-17 hours per day as the operator of a Union station, with the prospect of getting out of it less than he could earn as wages, or, indeed, no matter what the prospective operator thought he might earn? The answer is plainly "no."

3. THE VERDICT COULD NOT BE SUPPORTED ON ANY ALTERNATIVE THEORY.

All that happened when Union declined to give Simpson another lease was that Simpson was no longer able to follow his then occupation on a particular street corner. He suffered no physical impairment, loss of life expectancy, or business acumen. He could move to another station with no loss of earnings, *and he did.* He could change trades, and he did. As this Court noted in *Standard Oil Company v. Moore,* 251 F.2d 188, 220, n. 44 (9 Cir. 1957), *cert. den.* 356 U.S. 975:

> "Moore retains his life expectancy and business acumen. . . . he can, at least theoretically, do as well with it as he could have done by continuing in business at his Fourth Avenue South location."

Here we need indulge in no speculation about what Simpson could "theoretically" do elsewhere. We *know* that he went to a

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39. Union's instructions based on the *Moore* case (54 A-D, 1 R. 216-219) were refused and the failure to give them excepted to (R. 1655). Thus the jury was permitted to engage in the sophisticated task of valuing a business without the key guidelines for doing so. This alone would warrant granting a new trial.

40. Simpson's total outlay to enter the station was $3,700, with which he obtained the necessary equipment and inventory. (R. 627-629).

Mobil station where he made more than he did at the Union station. *In short, appellant was not damaged at all by leaving the Union station.* Leaving was, instead, an economic benefit to him.

It is doubtless for this reason that appellant has never urged a loss of income theory. The destruction of a business has been likened to "an ordinary tort claim for a broken arm", *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 396 (9 Cir. 1957) *cert. den.* 355 U.S. 835, and the rule of damages in "an ordinary tort claim for a broken arm" is succinctly stated in *Conte v. Flota Mercante Del Estado,* 277 F.2d 664, 669 (2 Cir. 1960):

> "The general principle is easily stated. The objective is to place the libelant in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what libelant's annual earning power would have been but for the injury, *deducting what it will be thereafter,* multiplying the result by libelant's life expectancy, and discounting the product to present value."

The verdict of $160,000 represents the present discounted value of about $10,500 per year over a 24-year period.[41] As appellant's earning power exceeded $5,000 per year after leaving the Union station,[42] he could suffer an annual loss of income equalling $10,500 only if the Union station could produce over $15,500 annually to Simpson. There is, of course, no evidence that *any* dealer, at *any* time earned $15,500 per year at *this* Union station, at *any* Union station, or at *any* service station of any brand. Simpson himself, at a Mobil station which averaged over 15,000 gallons per month (D. Ex. L), a figure substantially in excess of

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41. Plaintiff's Exhibit 68 contains the annuity factor of 15.246963 for a 24-year period. Dividing that factor into $160,000 yields approximately $10,500 per year.

42. Union's requested instruction 54 Revised (1 R. 220) would have told the jury that they were required to consider Simpson's earning power in other occupations. This instruction was refused and the refusal excepted to (R. 1655). As a result, the case was converted into what amounted to a personal injury case in which plaintiff was assumed to have been totally incapacitated.

the average gallonage at the Union station under everybody's operation during its entire existence (D. Ex. L), was able to earn only an average of $468.61 per month (D. Ex. K, p. 2), or some $5,600 per year.

The wildest speculation in the entire record is Professor Paglin's guess that *if* the Union station sold 25,000 gallons per month, *if* a 6¢ "net margin" (i.e., margin after deducting rent) was obtained for each gallon, and *if* a "normal" increase in the sales of tires, batteries, etc. were achieved, the station would yield about $13,200 per year. (R. 769). But there was never a single year when the station averaged 25,000 gallons per month; instead it averaged, over an 11-year period, barely more than half of that. (D. Ex. J). There is no evidence that any dealer in Fresno ever averaged 6¢ "net margin" per gallon; instead, the evidence is that Simpson averaged 5.59¢ per gallon as a Union dealer and 4.58¢ as a Mobil dealer (D. Ex. M), and that retail prices in Simpson's area could fall so low that Simpson himself believed it necessary to sell at prices which yielded him only 2.6¢ per gallon "net margin." (R. 882). And, of course, the evidence demonstrates that any computation premised on a 24-year basis is pure fiction.

4. FACTORS OTHER THAN EXCESSIVENESS REQUIRING A NEW TRIAL.

The fantastic size of the verdict, standing alone, was ample ground for granting a new trial. But the trial court had before it many factors in addition to the grossness of the verdict.

It was patent, for example, from a note sent by the jury during its deliberations and the subsequent colloquy between the Court and the foreman (R. 1660-1668) that the jury was totally confused about what it was supposed to determine. Its later verdict cast light on the significance of the episode as indicating that the jury was adding sums to cover income taxes, attorneys' fees and costs (R. 1803-4).[43] In addition, as previously noted (supra, pp.

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43. In the foreman's words (R. 1662):
"Well, we are asking is that what the plaintiff is going to get. . . . We want to start with the gross and deduct costs and so forth and end up with a net to the plaintiff."

75, 76), defendant's requested instructions stating the guidelines for measuring the value of a business, and those dealing with offsetting Simpson's earning power, were not given, with the result that case went to the jury in the posture of a wrongful death action.

Nor was this all. From beginning to end the case was presented by Simpson's counsel in a manner calculated to inflame and mislead the jury. Simpson was painted as the valiant war hero (E.g., R. 227, 552-553, 754) who had been wronged by the "big corporation".[43] "Damage" figures utterly without support in the evidence were written on the blackboard by appellant's counsel (R. 765-767), and prejudicial statements wholly outside the record were made in closing argument by appellant's counsel, despite the admonition of the Court. (R. 1608-1609; 1616-1618). Considering the case as a whole and the manner of its presentation, the trial court concluded that there had been a miscarriage of justice. We submit that this was "entirely within the discretion of the trial judge" (*Moist Cold Refrigeration Co. v. Lou Johnson, supra,* 294 F.2d at 256), and that there is no basis on which this Court could determine that that discretion was abused.

C. The Jurors' Affidavits Played No Part in the Trial Court's Determination.

After the jury had been discharged, counsel for appellee interviewed jurors Grignon, Smith and Price and filed the declaration of one (2 R. 345) and the affidavits of the other two (2 R. 347, 357) respecting the manner in which this extraordinary verdict was reached. Appellant urges that it was error for the trial court to "consider" or "countenance" these jurors' statements or to rule

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44. E.g., the opening statement of Simpson's counsel (R. 230):
"Now, it [Union Oil] is a company that is vast, has some subsidiaries you never hear about, that are wholly owned by the Union Oil Company, probably a billion-dollar company. Lord knows what its assets are; maybe they will tell us during the trial how big their assets are. The evidence will probably be in the hundreds of millions, up into the billion area. It's big, it's a big corporation."

on the motion for new trial with the affidavits before it.[45] (App. Op. Br. 58-60).

The complete answer is that *the trial court did not consider these jurors' statements in making his ruling.* In his own words, on granting the motion for new trial (R. 1803):

> "My reasons for this have nothing to do, or have I considered in any way at all, with the affidavits of jurors that have been filed herein."

Long before there was a verdict, the trial judge had expressed his concern with the "horribly speculative" nature of the damage evidence. (R. 842). And for the trial court's reaction immediately after the verdict and before there were any jurors' affidavits, one needs only read the trial judge's own statement (R. 1803-1804):

> "After the verdict was returned and I left this courtroom I was shocked with it just as I am now. There was more speculation, guesswork and conjecture in making up the sum of $160,000 than I have ever experienced with a jury and a return of a jury verdict—the question which took place in the courtroom with the jurors during this deliberation I think illustrates, to one point of view, at least, that this jury considered the situation to be such that—regardless of the affidavits and we don't have to consider them—they certainly had things in mind that they were not instructed that they could consider in any manner or means and in which they were not told that they were elements of damage in any way for this consideration."

In the face of these statements by the trial court, appellant brazenly asserts that the trial judge was nevertheless "unconsciously influenced" by the jurors' statements (App. Op. Br. 63) because the judgment notes that the verdict may have resulted from consideration by the jury of irrelevant factors. (2 R. 550). But the remarks of the trial court just quoted make plain that the

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45. Appellant also assails the ethics of appellee's counsel in talking to these jurors after their discharge. (App. Op. Br. 63). As a matter of personal privilege we cannot permit this charge to go unanswered, but, as it is peripheral to the matters before the Court, we reply to the claim in Appendix II.

irrelevant factors were disclosed to him not by the affidavits—"we don't have to consider them"—but by the note from the jury to the court during the jury's deliberation and from the subsequent colloquy with the foreman (R. 1660-1663).

CONCLUSION

We respectfully submit that there is no merit in the appeal and that this Court should affirm.

Dated: June 14, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 30 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

MOSES LASKY

(Appendix Follows)

Appendix I

THE PSEUDO QUESTION (p. 10 supra): The District Court Foreclosed No Issues Properly in the Case

On the first appeal, *Simpson v. Union Oil Company,* 311 F.2d 764 (1963), this Court observed that "to say the least, plaintiff's contentions vacillated" (p. 767), that on one day his counsel would disavow a contention and then on another reassert it, all resulting in an unsatisfactory record. The attempt to raise the pseudo-question is another example of this proclivity of counsel. By implication this Court admonished the District Court to be more assiduous in fixing issues, and this time the District Court was.

Plaintiff sought to inject the issues of "attempt to monopolize" and "tie-in" into this case on May 31, 1966, by a proposed amendment to his prior definitive pre-trial statement (1 R. 103). This was 8 years after the case had commenced and 2 years after it had been remanded by the Supreme Court. The case had already been pre-tried at length, not once but twice. A first series of protracted pre-trial conferences had taken place before Judge Burke in 1959 and 1960.* After remand from the Supreme Court, three pre-trial hearings had been held before Chief Judge Harris.† At the beginning of the case, in June 1958, Judge Harris, on a motion for preliminary injunction, summarized the case as follows (*Simpson v. Union Oil Company of California,* 162 F.Supp. 746, 747):

> "The substance of plaintiff's complaint is that defendant, acting under a consignment agreement for the disposition of gasoline products, has sought to fix retail prices. When plaintiff, in order to meet competition, refused to comply with defendant's price schedule, he was informed that he would not have his lease renewed."

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*The transcript of oral proceedings before Judge Burke totals 367 pages.

†Occupying 110 pages of transcript.

From that early date plaintiff's claim involved two issues and two only: (1) whether the contract between the parties constituted unlawful price fixing; and (2) if so, whether plaintiff suffered damages by reason thereof. Two and a half years later, in December 1960, after the extensive proceedings before him, Judge Burke filed a Memorandum and Order which detailed the claims of the parties in accord with what Judge Harris had epitomized before. Noting counsel's vacillations, Judge Burke stated that, nevertheless:

> "Extensive pre-trial proceedings before this court have eliminated all the factual disputes . . . [First R. 347]
> * * *
> "The fundamental issue in the instant action is the legality of Union's method of marketing gasoline by use of retail dealer consignment agreements. [First R. 349]
> * * *
> "However, the record indicates that plaintiff's case rests solely on the contention that the retail dealer consignment agreement as such, violates the Sherman Act." (First R. 350)

Although Judge Burke's dismissal of the case was reversed by the Supreme Court, not only was his definition of the issues not disturbed, but it was reasserted by plaintiff after the remand. When, after the remand, Union sought a pre-trial conference, plaintiff denied that there was any need for one (R. 9, 12, 15) and asked, instead, for an early trial date. To this end, on January 25, 1965, he filed a motion for a special trial setting and on April 14, 1965 he filed a motion to advance (1 R. 578). Then on August 24, 1965, he filed a document entitled "Plaintiff's Pre-Trial Statement" (1 R. 5-11), and he demanded that defendant be ordered to file its definitive trial statement (R. 15, 16, 30, 41). Defendant was so ordered (R. 30) and did so (1 R. 26). In plaintiff's "Pre-Trial Statement" of August 24, 1965, he stated the issues and his claim, just as had Judge Harris and Judge Burke, as turning on defendant's consignment system. This Pre-Trial Statement stated (1 R. 7, line 30, et seq.):

"By reason of the mandate of the United States Supreme Court dated May 25, 1964, plaintiff believes the only remaining issue of fact to be tried and proved by the plaintiff is the amount of damages suffered by the plaintiff."

The nature and cause of these damages were set forth as follows (1 R. 6, line 16 et seq.):

"Mr. Simpson signed the one-year lease and Retail Dealer Consignment Agreement, effective May, 1956. For some time he abided by the price orders of defendant pursuant to this Agreement, and in 1957 he determined to fix his own prices. On or about March, 1958, plaintiff lowered his retail price to 27.9¢ per gallon. He was ordered to set it at 29.9¢ per gallon. Mr. Simpson insisted that he had the right to fix the retail price, and defendant informed plaintiff that unless he fixed his price as ordered by the Union Oil Company, his lease would not be renewed in May, 1958. Mr. Simpson persisted in setting a competitive price *and his lease was not renewed for this reason.*"

This "pre-trial statement" of 18 pages, with exhibits, contained *not a word* about "attempts to monopolize" or about "tying arrangements". Not only were the issues which plaintiff sought to thrust into the case in May 1966 complex and foreign to what had gone before, but they had absolutely nothing to do with his claims of damage. His claims in that respect always have been two. First, he maintained that because of the consignment agreement, he was "unable" to set his own prices for gasoline, thereby being damaged in the sum of $1,000. This theory, with computations allegedly supporting it, appears in Plaintiff's Pre Trial Statement of August 24, 1965 with the statement:

"the Retail Dealer Consignment Agreement Program did not allow plaintiff to obtain 6¢ per gallon of gasoline sold margin, with resulting loss thereby." (1 R. 8, lines 27-30)

Plaintiff's second claim of damage, as set forth in that Pre-Trial Statement was premised on the fact that he was not given a further lease and, at plaintiff's urging and to focus the issues, the

parties stipulated that plaintiff was not given a further lease because he would not comply with the terms of the consignment agreement. (See p. 3, supra of this brief).

In the course of 8 years of litigation, concessions were made, and stipulations were given, all to facilitate sharpening the issues. What plaintiff sought to do by his purported "amendments" was to wash down the drain these 8 years of accomplishments of counsel and of three tiers of courts in framing the issues, and to wander at large through an entire catalogue of supposed antitrust violations. To permit it would have aborted the entire purpose of pre-trial.

It would be idle to wander through the discursive complaint to find the issues. 3 Moore's Federal Practice, § 16.11, p. 1115 (1964) cogently states the function of the pretrial conference as being to "crystallize the issues". A party's pretrial statement is binding on him. Stipulations reached and statements made at pretrial conferences are binding unless modified upon leave of court. *United States v. Tampa Bay Garden Apartments, Inc.,* 294 F.2d 598, 606 (5 Cir. 1961); *Laird v. Air Carrier Engine Service,* 263 F.2d 948, 953 (5 Cir. 1959). Parties are to be confined to the issues made by their pretrial statements. *Payne v. S. S. Nabob,* 302 F.2d 803, 806 (3 Cir. 1962), cert. den. 371 U.S. 870; *Valdesa Compania Naviera v. Frota Nacional de Petroleiros,* 348 F.2d 33, 37, 38 (3 Cir. 1965). In *Life Music, Inc. v. Broadcast Music, Inc.,* 31 F.R.D. 3 (S.D. N.Y. 1962), another treble damage antitrust action in which there had been numerous pretrial conferences over the years, the Court said

> "I have no doubt that the court has the power and the authority to define the issues where counsel have failed to agree as to what are the triable issues . . . ." (p. 6)
>
> * * *
>
> "To deny existence of the court's authority to define the issues where counsel fail to agree would make a mockery of all the extensive pre-trial procedures which courts have devised in an effort to reduce, as far as possible, the danger of chaos inherent in every protracted and complicated case." (p. 8)
>
> * * *

"These proposed additions are yet another attempt to broaden rather than define the issues. It may no longer be done at this stage of the proceedings." (p. 17)

When by its final Pretrial Order, (1 R. 123) the District Court defined the issues to be tried with precision, it held that plaintiff could present everything asserted in his Pre-Trial Statement, viz.:

"1. The issues to be tried are those set out in Plaintiff's Pre Trial Statement filed August 24, 1965, and the Pretrial Statement of Defendant Union Oil Company of California filed November 30, 1965" (1 R. 124),

and that the issues plaintiff sought to inject by amendment

"(a) are outside the issues of this case as said issues have been crystallized over a period of eight years of litigation between the parties;

"(b) would, if permitted now to be injected in the case, constitute a complete change of plaintiff's theory, which change is sought by plaintiff solely because of plaintiff's dissatisfaction with the Court's ruling set forth in paragraph 2 above, [i.e., on the equity issue] and would greatly increase the complexity of the case and protract the trial." (1 R. 125)

By that order the court acted well within its powers and discretion.

Appendix II

There Was Nothing Unethical or Improper in Interviewing Jurors in This Case After They Had Been Discharged.

Throughout the United States, and in California (CCP § 657 (2)), there are statutes which expressly authorize the use of jurors' affidavits on motion for new trial, and whatever evidence is admissible in the State courts is admissible in the federal courts. R.C.P. Rule 43(a). Even in the absence of statute, the authorities recognize that, in various circumstances, it is proper to receive such affidavits. E.g., *United States v. Beach,* 296 F.2d 153 (4 Cir. 1961); *Southern Pac. Co. v. Klinge,* 65 F.2d 85 (10 Cir. 1933), cert. den. 290 U.S. 657; *Aetna Life Ins. Co. v. Lindsay,* 69 F.2d 627 (7 Cir. 1934). Although it is probably impossible to reconcile the decisions respecting what those circumstances are, no one can deny that such circumstances exist. From these indisputable facts, it immediately follows that no blanket prohibition of interviewing jurors after discharge can be supported.

Appellant quotes (App. Op. Br. 59) Judge Fee's extraordinary statement in *Northern Pacific Railway Company v. Mely,* 219 F.2d 199 (9 Cir. 1954). We say "extraordinary", because only a year earlier the Court approved the propriety of establishing facts "by submitting affidavits of the jurors themselves". *Remmer v. United States,* 205 F.2d 277, 292 (9 Cir. 1953), rev'd on other grounds 347 U.S. 227. In any event, within two years of the *Mely* opinion, the Court withdrew from the extreme position there stated and wrote, in *Bryson v. United States,* 238 F.2d 657, 665 (9 Cir. 1956), cert. den. 355 U.S. 817:

> "Although interrogation of jurors may be prohibited as a general rule, it is permitted when there is some indication that grounds for impeachment of their verdict may be disclosed thereby."

More recently, the Court had before it *In re Sawyer,* 260 F.2d 189 (9 Cir. 1958), a disciplinary proceeding brought against a lawyer and including, as one charge, interviewing a juror after verdict. Without discussion of the point under consideration, the Court affirmed a disciplinary order. Judges Pope and Hamley dissented.

After quoting the language of *McDonald v. Pless,* 238 U.S. 264, 268 "that it would not be safe to lay down any inflexible rule" respecting juror's evidence "because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice'," and citing *Mattox v. United States,* 146 U.S. 140, as "an instance in which the court held that affidavits of jurors were properly used to show overt acts in the jury room which are accessible to the knowledge of all the jurors", Judge Pope's opinion continues (260 F.2d at 231):

> "Since jurors' affidavits may thus be used on motions for a new trial, a lawyer may *of course* interview the juror for the purpose of procuring the facts and the affidavits; *otherwise they would be unobtainable.*"

Although it was undisputed that counsel had repeatedly interviewed a juror, the Supreme Court reversed the disciplinary order. *In re Sawyer,* 360 U.S. 622 (1959).

The Code of Trial Conduct of the American College of Trial Lawyers (1965-1966) provides (para. 19(b)):

> "Subject to any limitations imposed by law it is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge. The scope of the interview should be restricted and caution should be used to avoid any embarrassment to any juror or to influence his action in any subsequent jury service."

A line of recent decisions demonstrates this to be a correct statement. Mr. Justice Holmes wrote in *Patterson v. Colorado,* 205 U.S. 454, 462 (1906):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

This very statement is quoted in *Sheppard v. Maxwell,* 384 U.S. 333, 351 (1966), and there styled the "undeviating rule" of the Supreme Court, while in *Turner v. Louisiana,* 379 U.S. 466, 472 (1965), the Court states:

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."

This was followed by *Parker v. Gladden,* 385 U.S. 363 (1966), reversing a conviction on the basis of comments made to jurors.

If these principles are to be more than theoretical pronouncements, there must be a way to bring evidence of jurors' conduct before the trial court. That jurors' affidavits are proper for such purposes is obvious from *United States v. McMann,* 373 F.2d 759 (1967). There, the New York Court of Appeals had refused to consider such affidavits on the theory that they could not be used to impeach a verdict. On *habeas corpus,* the cause was remanded to the State courts for further consideration in the light of *Parker v. Gladden, supra.*

A recent discussion by this Court of jurors' affidavits is found in *Evalt v. United States,* 359 F.2d 534 (9 Cir. 1966). There, it was urged that counsel's improper argument to the jury had been prejudicial, and the affidavits of two jurors were offered, each of which stated that if the juror had known a certain fact, he would have voted differently. Without passing on the admissibility of the affidavits, *and without even a suggestion that obtaining them was unethical,* the Court recognized that the affidavits showed that the claim of prejudice was not imaginary. It said (359 F.2d at 546, n. 15):

> "We do not here pass upon the vexed question as to whether affidavits of jurors may be received to impeach the verdict. [Many citations including the *Mely* case cited by appellant.] Under most of the foregoing cases, the affidavits would probably be both inadmissible and insufficient to impeach the verdict if admitted. We cite them only as illustrating that our view as to the prejudicial nature of what happened here is by no means a figment of the oversensitive imagination of those who inhabit the ivory tower of the appellate bench. Further confirmation is found in that portion of the record that relates to the first trial, at which the

> jury was unable to agree. They sent notes to the judge, during their deliberations, asking the following questions: 'Can jury give verdict of guilty with recommendation of psychiatric treatment? Can jury give verdict of not guilty with recommendation that defendant be committed to mental institution?' "

The parallel between *Evalt* and the instant case is striking. Whether the juror's affidavits in this case were either admissible or sufficient to "impeach" the verdict is beside the point, because the trial court disregarded them. But the jury's note, the colloquy which followed between the trial court and the foreman, and the fantastic amount of the verdict fully warranted interview of the jurors after discharge.